No. 91-687-CSY
Status: GRANTED

Title: Montana, Petitioner
v.
Donald Glenn Imlay

Docketed:
October 21, 1991

Court: Supreme Court of Montana

Counsel for petitioner: Griffing,Elizabeth L.

Counsel for respondent: Miller,Billy B.

NOTE: See mail label re dkt dt

Entry	Date	Note	Proceedings and Orders
1	Oct 21 1991	G	Petition for writ of certiorari filed.
3	Nov 20 1991		Brief amici curiae of Idaho, et al. filed.
2	Nov 26 1991		DISTRIBUTED. December 13, 1991
4	Dec 10 1991	P	Response requested -- WHR. (Due January 10, 1992)
6	Dec 31 1991		Order extending time to file response to petition until February 10, 1992.
7	Feb 7 1992		Brief of respondent Donald Imlay in opposition filed.
8	Feb 12 1992		REDISTRIBUTED. February 28, 1992
9	Feb 18 1992	X	Reply brief of petitioner Montana filed.
10	Mar 2 1992		Petition GRANTED.
			**********
11	Apr 10 1992		Brief amicus curiae of American Professional Society on the Abuse of Children filed.
12	Apr 16 1992		Joint appendix filed.
13	Apr 16 1992		Brief of petitioner Montana filed.
14	Apr 16 1992		Brief amici curiae of Vermont, et al. filed.
15	Apr 16 1992		Brief amicus curiae of United States filed.
16	May 18 1992		Brief of respondent Donald Imlay filed.
17	Jun 11 1992		Record filed.
		*	Original proceedings Supreme Court of Montana.
18	Jun 22 1992		Reply brief of petitioner filed.
19	Jul 2 1992		Record filed.
		*	Original proceedings Montana Eighth Judicial District Court, Cascade County (Confidential Information)
20	Jul 10 1992		CIRCULATED.
21	Jul 21 1992		SET FOR ARGUMENT WEDNESDAY, OCTOBER 7, 1992. (1ST CASE).
22	Jul 29 1992	X	Supplemental brief of respondent filed.
23	Aug 12 1992	G	Motion of respondent for leave to proceed further herein in forma pauperis filed.
24	Aug 12 1992	G	Motion of respondent for appointment of counsel nunc pro tunc filed.
25	Aug 19 1992		REDISTRIBUTED. September 28, 1992
26	Aug 24 1992	D	Motion of petitioner to strike supplemental brief of respondent filed.
27	Sep 24 1992	X	Brief of petitioner in response to supplemental brief filed.
28	Oct 5 1992		Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
29	Oct 5 1992		Motion of respondent for appointment of counsel nunc pro tunc GRANTED. and it is ordered that Billy B. Miller, Esquire, of Great Falls, Montana, is appointed to serve as counsel for the respondent in this case.

No. 91-687-CSY

Entry	Date	Note	Proceedings and Orders
30	Oct 5 1992		Motion of petitioner to strike supplemental brief of respondent DENIED.
31	Oct 7 1992		ARGUED.

91-687

(1)

Supreme Court, U.S.
FILED
OCT 21 1991
OFFICE OF THE CLERK

No. 91-

In The
Supreme Court of the United States
October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
STATE OF MONTANA
Justice Building
215 North Sanders
Helena MT 59620
(406) 444-2026

*Counsel of Record

QUESTION PRESENTED

Is a probationer's privilege against self-incrimination under the Fifth Amendment as applied to the states through the Fourteenth Amendment violated by the revocation of his probation for failure to comply with the condition that he complete sex offender therapy when the successful completion of the therapy requires the probationer to accept responsibility for the crime of which he was convicted?

TABLE OF CONTENTS

QUESTION PRESENTED i

OPINION BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THE STATE COURT ERRED BY HOLDING THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS AVAILABLE TO A PROBATIONER WITH RESPECT TO STATEMENTS CONCERNING THE CRIME FOR WHICH HE HAS ALREADY BEEN CONVICTED WHEN THE STATEMENTS COULD NOT REALISTICALLY BE USED IN A FUTURE CRIMINAL PROSECUTION . . . 8

II. THE STATE COURT ERRED BY HOLDING THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS AVAILABLE TO A PROBATIONER WITH RESPECT TO STATEMENTS CONCERNING THE CRIME FOR WHICH HE HAS ALREADY BEEN CONVICTED WHEN THE STATEMENTS ARE REQUIRED SOLELY FOR THE PURPOSES OF TREATMENT AND REHABILITATION . 13

TABLE OF CONTENTS
(Cont.)

III. THE STATE COURT'S RELIANCE UPON THOMAS IS MISPLACED 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Allen v. Illinois,
478 U.S. 364 (1986) 6, 7, 13, 15

Asherman v. Meachum,
932 F.2d 137 (2d Cir. 1991),
reh'g en banc pending 14

Baxter v. Palmigiano,
425 U.S. 308 (1976) 12

Estelle v. Smith,
451 U.S. 454 (1981) 14

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 6

Gardner v. Broderick,
392 U.S. 273 (1968) 10

Garrity v. State of New Jersey,
385 U.S. 493 (1967) 10

TABLE OF AUTHORITIES
(Cont.)

Gollaher v. United States,
419 U.S. 520 (9th Cir. 1969) 4, 6, 17

Henderson v. State,
543 So. 2d 344 (Fla. Dist. Ct. App. 1989) . . . 7, 11

In Re Gault,
387 U.S. 1 (1967) 13, 15

Lefkowitz v. Cunningham,
431 U.S. 801 (1977) 10, 12

Lefkowitz v. Turley,
414 U.S. 70 (1973) 8, 10

Mace v. Amestoy,
765 F. Supp. 847 (D. Vt. 1991) 14

Malloy v. Hogan,
378 U.S. 1 (1964) 8

Minnesota v. Murphy,
465 U.S. 435 (1984) 5, 6, 8, 11-13

People v. Baker,
526 N.E.2d 157 (Ill. 1988) 8

Reina v. United States,
364 U.S. 512 (1960) 8

Russell v. Eaves,
722 F. Supp. 558 (E.D. Mo. 1989) 7, 11

TABLE OF AUTHORITIES
(Cont.)

State v. Gleason,
576 A.2d 1246 (Vt. 1990) 7, 9, 11

State v. Thiel,
768 P.2d 343 (Mont. 1989) 9

Taylor v. Best.
746 F.2d 220 (1984) 14

Thomas v. United States,
368 F.2d 941 (5th Cir. 1966) 4, 6, 15-18

Ullmann v. United States,
350 U.S. 429 (1956) 8

Uniformed Sanitation Men Ass'n.
v. Comm'r of Sanitation,
392 U.S. 280 (1968) 10

United States v. Gonzalez-Mares,
752 F.2d 1485 (9th Cir. 1985) 6, 16

United States v. Grayson,
438 U.S. 41 (1978) 9

United States v. Henry,
883 F.2d 1010 (11th Cir. 1989) 16

United States v. Hull,
792 F. 2d 941 (9th Cir. 1986) 17

United States v. Mourning,
914 F.2d 699 (5th Cir. 1990) 16

TABLE OF AUTHORITIES
(Cont.)

United States v. Oliveras,
905 F.2d 623 (2d Cir. 1990) 16

United States v. Paz Uribe,
891 F.2d 396 (1st Cir. 1989) 16

United States v. Rogers,
921 F.2d 975 (10th Cir. 1990) 16

United States v. Segal,
549 F. 2d 1293 (9th Cir. 1977) 17

United States v. Wong,
431 U.S. 174 (1977) 9

OTHER AUTHORITIES

Montana Code Annotated (1989)
§ 45-5-502 2
§ 45-5-502(3) 3

Montana Constitution
Art. II, § 25 5

United States Constitution
Amendment I 4
Amendment V . . . . . Passim
Amendment XIV 5, 8

United States Sentencing Guidelines
§ 3E1.1 7

No. 91-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

OPINION BELOW

The opinion of the Montana Supreme Court is reported at 813 P.2d 979. (App. 1a.)

JURISDICTION

The state court opinion was filed on June 18, 1991. (App. 1a) The order denying the petition for rehearing was filed July 23, 1991. (App. 26a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution:

> No person ... shall be compelled in any criminal case to be a witness against himself[.]

2. Mont. Code Ann. § 45-5-502 (1989):

> **Sexual assault.** (1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.
>
> (2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.
>
> (3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years and may be fined not more than $50,000.
>
> (4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.
>
> (5) Consent is ineffective under this section if the victim is less than 14 years old and the offender is 3 or more years older than the victim.

STATEMENT OF THE CASE

Following a jury trial at which he maintained his innocence, Donald Imlay was found guilty of felony sexual assault of a seven-year-old girl in violation of Mont. Code Ann. § 45-5-502(3) (1989). Imlay was sentenced to five years in the Montana State Prison, with all of the prison term suspended on the primary condition that he "immediately enroll in a sexual therapy program at his own expense and continue said program until his therapist deems further counseling and therapy unnecessary." (App. 19a-20a.)

Imlay enrolled in a sexual therapy program and participated in the program for four months, meeting with his therapist a total of six times. Throughout therapy, Imlay denied that sexual contact had occurred between himself and the child. No progress was made in the therapy because of Imlay's continued denial. The therapist informed Imlay that he could not continue with outpatient treatment unless he accepted responsibility for the act of which he had been convicted.

A petition to revoke Imlay's probation was filed because of Imlay's failure to complete the outpatient sexual therapy program. At the revocation hearing, the therapist testified that because of his continued denial Imlay was not acceptable for outpatient treatment. The therapist recommended inpatient treatment for Imlay, so that therapy could be provided on a more regular, structured basis than outpatient therapy. The only inpatient treatment center for sex offenders is located at the Montana State Prison.

Imlay's suspended sentence was revoked because his continued denial of guilt of the act of which he had been convicted foreclosed acceptance into the outpatient sex

offender treatment program. (App. 24a-25a.) The state district court concluded that the only viable alternative was for Imlay to attend the inpatient sex offender program at the Montana State Prison. (App. 24a.) The state district court sentenced Imlay to five years in the Montana State Prison, recommending that Imlay be eligible for parole once he completed the sexual offender program at the prison. (App. 25a)

Imlay appealed this decision to the Montana Supreme Court, claiming that the condition to comply with sex offender treatment was unconstitutionally vague, that it violated his right to self-expression protected under the First Amendment to the United States Constitution and that the condition was generally inequitable and unfair. Imlay did not raise on appeal the issue of whether the condition to complete sex offender treatment violated his privilege against self-incrimination. However, the Montana Supreme Court raised the issue *sua sponte*, concluding that the condition to complete the sex offender program violated Imlay's privilege against self-incrimination because it required his admission of guilt for the crime of which he had been convicted. Relying upon federal case law[1] and

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[1]The Montana Supreme Court relied almost exclusively on the holding in Thomas v. United States, 368 F.2d 941 (5th Cir. 1966), which held that the federal district court erred in augmenting the sentence of a defendant who refused to admit his guilt for the crime of which he had been convicted. The state court noted, however, that this holding was expressly rejected by the Ninth Circuit Court of Appeals in Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969).

the Fifth Amendment to the United States Constitution,[2] the Montana Court vacated the sentence.[3]

REASONS FOR GRANTING THE WRIT

The State of Montana petitions this Court for a writ of certiorari because the state court decided a substantial federal question in conflict with applicable decisions of this Court, with the Circuit Court of Appeals for the Ninth Circuit within which the State of Montana is located, and with the decision of another state's highest court. In particular, the decision is in conflict with this Court's holding in Minnesota v. Murphy, 465 U.S. 435 n.7 (1984), in which it was held that a probationer has no

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[2]The Montana Court held: "[W]e believe that the better reasoned decisions are those decisions which protect the defendant's constitutional right against self-incrimination, and which prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." (App. 14a.) The "better reasoned decisions" referred to by the Montana Court are decisions that relied upon the Fifth Amendment to the United States Constitution or the Fourteenth Amendment to the United States Constitution. At no time in the opinion did the Montana Court refer to Art. II, § 25 of the Montana Constitution, which provides that "[n]o person shall be compelled to testify against himself in a criminal proceeding."

[3]Imlay has been resentenced by the state district court. The court imposed a five-year sentence at the Montana State Prison, without the condition or recommendation that he undergo in-patient sex offender treatment. Because the sex offender treatment program at the prison also requires any individual to accept responsibility for the act of which he has been convicted, the State is still precluded from requiring Imlay to participate in any sex offender treatment at the prison or otherwise. *See* App. 12a-13a. The state court decision effectively eradicated the possibility of court-ordered treatment for probationers, parolees and inmates whenever the treatment requires the patient to accept responsibility for the act of which he was convicted.

privilege against self-incrimination with respect to questions concerning his probationary status when there is no realistic threat of incrimination in a separate criminal proceeding. Further, the state court's decision is in conflict with this Court's holding in Allen v. Illinois, 478 U.S. 364 (1986), in which this Court held that the privilege against self-incrimination was not available in civil proceedings even when the result of the proceedings is deprivation of liberty, as long as the purpose of the proceedings is to provide treatment. Here, the probationer had no privilege against self-incrimination because his silence was considered solely with respect to revocation proceedings which are civil proceedings.[4] Also, there was no realistic threat that his silence or any statements he might have made with respect to the crime of which he was convicted would have been used in a future criminal prosecution. Finally, his participation in the sexual therapy program was required solely for purposes of treatment and rehabilitation.

The Montana Supreme Court decision is also in direct conflict with the holdings of the United States Court of Appeals for the Ninth Circuit. The Montana Court concedes that its decision conflicts with Gollaher v. United States, 419 U.S. 520 (9th Cir. 1969).[5] Further, as more completely discussed below, the Montana Court's reliance upon Thomas v. United States, 368 F.2d 941 (5th Cir.

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[4]Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty).

[5]*See also* United States v. Gonzalez-Mares, 752 F.2d 1485, 1489 (9th Cir. 1985), in which the Ninth Circuit acknowledges the holding in Minnesota v. Murphy, *supra*, that a probationer is not entitled to invoke the privilege against self-incrimination in response to questions about his probation status.

1966), is misplaced in light of the adoption of the federal sentencing guideline, § 3E1.1, U.S.S.G., which expressly allows consideration of acceptance of responsibility in determining the length of a defendant's sentence.

Lastly, the Montana Supreme Court decision conflicts with State v. Gleason, 576 A.2d 1246 (Vt. 1990), in which the Vermont Supreme Court held that a sex offender's failure to discuss, during therapy, the crime of which he was convicted provided an adequate basis to revoke probation and did not offend the privilege against self-incrimination.[6]

The substantial nature of the federal question presented, moreover, cannot be overemphasized. The Montana Supreme Court decision effectively eviscerates sex offender programs and any other similar therapy programs. The issue here involves the balancing of the fundamental privilege against self-incrimination with the treatment that is available, and hopefully beneficial, to not only sex offenders, but any offender for whom treatment to overcome denial of a problem would be rehabilitative and beneficial. As such, this matter is of significant consequence, not only for sex offender treatment programs, but also for other therapy and treatment

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[6]The state court holding also conflicts with the decisions of other lower federal and state courts. In Russell v. Eaves, 722 F. Supp. 558 (E.D. Mo. 1989), the federal district court found that the Fifth Amendment challenge to a prison's sex offender treatment program was "legally frivolous," citing Allen v. Illinois, *supra*, for the proposition that the program was not a criminal proceeding but a clinical rehabilitative program. In Henderson v. State, 543 So. 2d 344 (Fla. Dist. Ct. App. 1989), a Florida intermediate appellate court upheld a requirement that sex offenders admit responsibility for the acts of which they were convicted stating that there was no privilege against self-incrimination with respect to the crime for which the offender had been convicted.

programs which require a patient to admit to his behavior as a condition of successful treatment.[7]

I. THE STATE COURT ERRED BY HOLDING THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS AVAILABLE TO A PROBATIONER WITH RESPECT TO STATEMENTS CONCERNING THE CRIME FOR WHICH HE HAS ALREADY BEEN CONVICTED WHEN THE STATEMENTS COULD NOT REALISTICALLY BE USED IN A FUTURE CRIMINAL PROSECUTION.

The Fifth Amendment privilege against self-incrimination, applicable to the states through the Fourteenth Amendment,[8] provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself." The privilege "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers *might incriminate him in future criminal proceedings.*'" (Emphasis added.) Minnesota v. Murphy, 465 U.S. 420, 426 (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)). It is axiomatic that the self-incrimination which the Amendment forbids is exposure to a criminal charge. Ullmann v. United States, 350 U.S. 429, 431 (1956); Reina v. United States, 364 U.S. 512, 516

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[7]*See, e.g.*, People v. Baker, 526 N.E.2d 157 (Ill. 1988), in which the Illinois Supreme Court discusses the privilege against self-incrimination and the admission of past drunken driving convictions in the context of treatment for abuse of alcohol and drugs.

[8]Malloy v. Hogan, 378 U.S. 1 (1964).

v. United States, 364 U.S. 512, 516 (1960). Here, the state court failed to recognize that there was never any danger or realistic threat that Imlay's responses during therapy would be used to incriminate him in any future criminal proceeding. He had already been convicted of the crime of sexual assault and could not again be so convicted. In State v. Gleason, *supra*, the Vermont Supreme Court recognized that "the imposition of sentence extinguishes the privilege against self-incrimination with respect to the crime of which the accused is convicted and, because of the protection against double jeopardy, defendant faces no threat of subsequent prosecution for the offense." 576 A.2d at 1250.

The Montana Supreme Court suggested that Imlay was under the threat of perjury. (App. 14a.) While it is unclear from the opinion, presumably, the Court reasoned that because Imlay testified to his innocence at trial and denied the sexual assault, there was the realistic threat of prosecution for perjury if he admitted the crime during post-sentencing therapy. Not only is it unrealistic to suggest that Imlay would be prosecuted for complying with a probationary condition,[9] it is also well settled that the Fifth Amendment privilege may not be used to shield perjury. *See* United States v. Wong, 431 U.S. 174, 178 (1977) ("[T]he Fifth Amendment privilege does not condone perjury"); United States v. Grayson, 438 U.S. 41, 54 (1978) ("There is no protected right to commit perjury"). The threat of a possible perjury charge is not a realistic threat of future criminal prosecution that is

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[9]Prior Montana case law indicates that such statements, made during the course of therapy, would not be admissible in a future criminal proceeding. State v. Thiel, 768 P.2d 343, 345 (Mont. 1989) (violation of Fifth Amendment privilege occurs if future charges are based on uncharged criminal acts that are revealed during a mental evaluation).

protected by the Fifth Amendment privilege against self-incrimination.

The state court also suggests that there was an impermissible penalty imposed upon Imlay for exercising his privilege against self-incrimination because he had his probation revoked and was sent to the Montana State Prison for inpatient treatment. (App. 14a.) By viewing probation revocation as an impermissible penalty, the state court seems to be invoking the "penalty" cases of this Court without an analysis of any of the reasoning in those cases.[10] If it can be inferred that the state court was relying upon the "penalty" cases, then such reliance was nonetheless in error and a misconstruction of this Court's cases.

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[10]The "penalty" cases include those cases in which the State has compelled a witness to testify, inducing him to choose between the exercise of his Fifth Amendment rights and the imposition of economic or other sanctions. *See* Garrity v. State of New Jersey, 385 U.S. 493 (1967) (statements made under the threat of removal from office may not be used in subsequent criminal proceedings); Gardner v. Broderick, 392 U.S. 273 (1968) (discharge from employment for refusal to waive privilege against self-incrimination is violative of Fifth Amendment); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280 (1968) (loss of employment is an impermissible penalty for exercising privilege against self-incrimination); Lefkowitz v. Turley, 414 U.S. 70 (1973) (threat of substantial economic sanctions creates involuntary waiver of Fifth Amendment privilege); Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (regulation requiring waiver of Fifth Amendment privilege or loss of political office imposed impermissible penalty for exercising privilege). In each penalty case, the choice was between the possibility of use of the statements in future criminal proceedings or imposition of sanctions. Such a choice was not imposed upon Imlay because the statements solicited at therapy concerned solely the crime of which he was convicted and would not expose Imlay to any future criminal prosecution.

As this Court recognized in Minnesota v. Murphy, *supra*, the threat of revocation would be impermissible to pressure a defendant to answer questions that would incriminate him *in a pending or later criminal prosecution*. 465 U.S. at 435. Here, the therapist wanted answers to questions concerning only the crime of which Imlay had already been convicted and sentenced. As discussed above, Imlay's responses would not have served to incriminate him in a future criminal prosecution in which the Fifth Amendment privilege would afford him protection. Any statements that Imlay may have made could not have been considered "compelled" statements protected by the Fifth Amendment. Imlay had the choice to remain silent or to discuss the conduct for which he had already been convicted. At no time was Imlay compelled to make incriminating statements.[11]

In Minnesota v. Murphy, *supra*, this Court recognized that questions that might result in revocation of probation are permissible questions because the revocation proceedings are civil proceedings and cannot be considered pending or later criminal prosecutions. After acknowledging that the "classic" penalty situation would arise if a probationer was threatened with revocation in order to obtain statements concerning uncharged criminal conduct, this Court made a very important qualifying note:

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[11]In State v. Gleason, 576 A.2d at 1246, the Vermont Supreme Court recognized that because the probationer was required to describe only the crimes of which he had been convicted, the State had not taken the "impermissible step of compelling a defendant to make incriminating statements and jeopardizing his conditional liberty." Similarly, in Russell v. Eaves, 722 F. Supp. at 560-61, the federal district court reasoned that the statements sought in the prison sex offender program concerned only the crime of which the plaintiff had been convicted and therefore the plaintiff had the choice of refusing to participate in the program. *See also* Henderson v. State, *supra*.

> The situation would be different if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding. ... Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. ... Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer. ...
>
> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. ... [A]nd nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by the finder of fact" in deciding whether other conditions of probation have been violated. *Lefkowitz v. Cunningham, supra*, 431 U.S., at 808, n. 5, 97 S.Ct., at 2137, n. 5. See *Baxter v. Palmigiano*, 425 U.S. 308, 317-318, 96 S.Ct. 1551, 1557-1558, 47 L.Ed.2d 810 (1976).

Minnesota v. Murphy, 465 U. S. at 434 n.7 (some citations omitted). Thus, while the threat of revocation of a suspended sentence is not permissible with respect to statements concerning a separate criminal proceeding, such a threat does not invoke an impermissible "penalty" if the statements are a required condition for probation

and relate to the matter for which a defendant has already been convicted.

Based upon this footnote in Minnesota v. Murphy, this Court has stated that "a person may not claim the privilege [against self-incrimination] merely because his answer might result in revocation of his probationary status." Allen v. Illinois, 478 U.S. at 372. Similarly, a person may not claim the privilege because his silence might result in revocation of his probationary status.

II. THE STATE COURT ERRED BY HOLDING THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS AVAILABLE TO A PROBATIONER WITH RESPECT TO STATEMENTS CONCERNING THE CRIME FOR WHICH HE HAS ALREADY BEEN CONVICTED WHEN THE STATEMENTS ARE REQUIRED SOLELY FOR THE PURPOSES OF TREATMENT AND REHABILITATION.

In Allen v. Illinois, *supra*, this Court expressly recognized that, in the context of alleged Fifth Amendment violations, a distinction must be made between statements that would be used for treatment and those that might be used for punishment. In deciding that the right against self-incrimination did not apply to an Illinois proceeding designating a defendant as a sexually dangerous person, this Court stated:

> The Court in *Gault* [387 U.S. 1 (1967)] was obviously persuaded that the State intended to *punish* its juvenile offenders, observing that in many States juveniles may be placed in "adult penal institutions" for conduct that if committed by an adult would be a crime. ... Here, by

> contrast, the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment. That the Menard Psychiatric Center houses not only sexually dangerous persons but also prisoners from other institutions who are in need of psychiatric treatment does not transform the State's intent to treat into an intent to punish. [Emphasis in original.]

478 U.S. at 373. If statements are therefore required for treatment and rehabilitation rather than punishment then the statements cannot be considered incriminating.[12] Here, the intent of the condition that Imlay undergo sex offender treatment was not to punish Imlay or inflict any sort of penalty upon him, but to allow Imlay to attend the outpatient sex offender therapy. When Imlay's probation was revoked, the district court recognized that he was not amenable to outpatient therapy, and hoped that inpatient therapy, available only at the Montana State Prison, would

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[12]This distinction is also important in the context of presentence and pretrial examinations. In that context this Court has recognized that when a mental examination is not used to "punish" the defendant, then there is no violation of the Fifth Amendment privilege. *See* Estelle v. Smith, 451 U.S. 454 (1981); Taylor v. Best, 746 F.2d 220, 224 (1984) (no Fifth Amendment violation when the clear purpose of the mental evaluation is to evaluate the prisoner so that he may be assigned to the appropriate institution at the appropriate custody level with a basic program plan for treatment that fits his rehabilitation and training needs); *but cf.* Asherman v. Meachum, 932 F.2d 137 (2d Cir. 1991), *reh'g en banc pending* (requirement to undergo mental examination for purposes of determining continued supervised home release is violative of Fifth Amendment privilege); Mace v. Amestoy, 765 F. Supp. 847 (D. Vt. 1991) (probationer must be granted immunity for statements made during sex offender treatment concerning *uncharged* criminal acts).

be more successful. The intent was to provide treatment, not punish Imlay. (App. 24a.)

In Allen v. Illinois, 478 U.S. at 372, this Court recognized that involuntary incarceration does not itself trigger the entire range of criminal procedural protection. Disapproving of prior statements in In re Gault, 387 U.S. at 50, this Court stated: "First, Gault's sweeping statement that 'our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty' ... *is plainly not good law*." 478 U.S. at 372 (emphasis added) (citation omitted). Even though silence may result in revocation, the loss of liberty does not offend the privilege against self-incrimination because the revocation proceeding is not a criminal proceeding and because the loss of liberty was based upon a concern for treatment and rehabilitation, rather than punishment.

III. THE STATE COURT'S RELIANCE UPON THOMAS IS MISPLACED.

By focusing upon Thomas v. United States, *supra*, the state court failed to recognize the above-discussed controlling precedent of this Court on the scope of the protection afforded under the privilege against self-incrimination. Thomas and the line of case law relied upon by the Montana Supreme Court are not applicable to the present situation and are not controlling with respect to the application of the Fifth Amendment privilege in probation revocation proceedings. Thomas involved the allocution stage of sentencing in which a defendant is allowed to make any statement in his own behalf. The court in Thomas held that a sentencing court violates a defendant's privilege against self-incrimination by "augmenting" his sentence if he fails to accept

responsibility for the crime. With respect to the revocation of Imlay's probation, there was no "augmentation" of the sentence when Imlay's probation was revoked. The state district court had shown leniency to Imlay by giving him the opportunity for treatment. The rescission of that leniency when it was discovered that Imlay was not amenable to treatment was not an "increase" or "augmentation" of the sentence. The Montana court simply erred in applying the Thomas reasoning to a probation revocation situation.[13]

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[13] There is further significant doubt as to whether the Thomas decision can be considered controlling authority in light of the adoption of § 3E1.1, U.S.S.G., which allows the consideration at sentencing of a defendant's acceptance of responsibility for the crime of which he has been convicted. While there may be a subtle difference between augmenting a sentence by failing to accept responsibility and decreasing a sentence by accepting responsibility, the Fifth Circuit Court of Appeals now allows consideration of admission of guilt to reduce a sentence. See United States v. Mourning, 914 F.2d 699 (5th Cir. 1990). While the circuits may differ as to whether § 3E1.1 encompasses criminal conduct other than that for which a defendant has been convicted, the circuits uniformly hold that the sentencing guideline does not offend the Fifth Amendment with respect to the crime for which a defendant has been convicted. United States v. Paz Uribe, 891 F.2d 396 (1st Cir. 1989) (no self-incrimination violation because § 3E1.1 merely codifies a tradition of leniency, not enhancement of a sentence); United States v. Oliveras, 905 F.2d 623 (2nd Cir. 1990) (no violation of the privilege against self-incrimination with respect to the counts to which a defendant plead guilty); United States v. Gonzalez, 897 F.2d 1018 (9th Cir. 1990) (Fifth Amendment not offended by defendant who seeks reduction under § 3E1.1 but who maintained his innocence throughout trial); United States v. Rogers, 921 F.2d 975 (10th Cir. 1990) (no violation of Fifth Amendment because defendant was required to divulge circumstances of the crime for which he was convicted, not circumstances concerning unproved, uncharged conduct); United States v. Henry, 883 F.2d 1010 (11th Cir. 1989) (no self-incrimination violation for defendant who maintained innocence at

(continued...)

Even if the Thomas decision can be considered applicable current authority, the decision is in direct conflict with the decisions of the Ninth Circuit Court of Appeals. In Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969), that circuit stressed the importance for rehabilitation purposes of the sentencing court considering the acceptance of responsibility of the crime of which a defendant has been convicted. The Gollaher court stated:

> It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault. In the present state of the criminal law, there is no doubt that punishment is still a consideration in the imposition of sentence, especially where non-violent or economic crimes are involved. But to the extent that rehabilitation is the objective, no fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence.

419 F.2d at 530. In United States v. Hull, 792 F.2d 941 (9th Cir. 1986), the Ninth Circuit reaffirmed this reasoning and held that, with respect to the privilege against self-incrimination, a federal district court could properly deny probation for failure to accept responsibility for the act of which the offender had been convicted. Quoting United States v. Segal, 549 F.2d 1293, 1299 n.3 (9th Cir. 1977), the Court stated, "[A] sentencing court could impose a harsh sentence as a penalty for the defendant's refusal to admit his guilt, since an admission would evidence the first step in rehabilitation." 792 F.2d at 943. Thus, assuming

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[13](...continued)
trial because Court was unwilling to equate the possibility of leniency with impermissible punishment).

arguendo that the Thomas line of cases is applicable, there is nevertheless significant conflict between the Ninth Circuit Court of Appeals and the Thomas line of cases on the issue of whether the district court can consider the acceptance of responsibility by a convicted defendant prior to sentencing.

CONCLUSION

Because the lower court's decision so clearly conflicts with prior precedent of this Court and because of the significant and substantial consequences such a decision has upon treatment for criminal defendants, the State of Montana respectfully requests that the petition for certiorari be granted and that the state court's judgment below be summarily reversed. Alternatively, the petitioner requests that the petition be granted and that full briefing and argument be scheduled.

Respectfully submitted,

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
STATE OF MONTANA
Justice Building
215 North Sanders
Helena MT 59620
(406) 444-2026

*Counsel of Record

October 1991

APPENDIX

APPENDIX

Item		Page
1.	Montana Supreme Court Opinion, June 18, 1991	1a
2.	Montana Eighth Judicial District Court, Cascade County, Judgment of Conviction and Sentencing Order	16a
3.	Montana Eighth Judicial District Court, Cascade County, Order Revoking Suspended Sentence and Sentencing Order	21a
4.	Montana Supreme Court Order, July 23, 1991	26a

No. 90-493
IN THE SUPREME COURT OF THE
STATE OF MONTANA 1991

STATE OF MONTANA,
Plaintiff and Respondent,
v.
DONALD GLENN IMLAY,
Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District, In and for the County of Cascade, The Honorable Joel G. Roth, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Billy B. Miller, Miller & Cook
Great Falls, Montana

For Respondent:

Honorable Marc Racicot, Attorney General, Helena, Montana; Elizabeth L. Griffing, Assistant Attorney General, Helena, Montana; Patrick L. Paul, Cascade County Attorney, Great Falls, Montana; Kim Schulke, Chief Deputy County Attorney, Great Falls, Montana

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Submitted on Briefs: March 28, 1991
Decided June 18, 1991

Filed: /s/ Ed Smith

Justice Terry N. Trieweiler delivered the opinion of the Court.

Following a jury trial, the defendant, Donald Glenn Imlay, was convicted in District Court of sexual assault, a felony, in violation of § 45-5-502, MCA. Based on that conviction, he was sentenced by the District Court to five years in the Montana State Prison. However, all but 35 days of that sentence were suspended, and the defendant was placed on formal probation, under certain conditions, including the condition that he enroll in and complete a sexual therapy program. When the defendant enrolled in, but was unable to complete the sexual therapy program, his suspended sentence was revoked and he was ordered imprisoned at the Montana State Prison for the remainder of his five-year term. The defendant appeals from the District Court's order revoking his suspended sentence. We reverse the order of the District Court.

On appeal, the defendant raises several issues. We find the following issue, as restated by this Court, to be controlling:

Can a criminal defendant, as a condition of a suspended sentence, be compelled to admit that he is guilty of the crime of which he has been accused and convicted?

FACTUAL BACKGROUND

On May 9, 1989, the State of Montana was granted leave to file an Information charging the defendant with three counts of sexual assault, a felony. On September 5, 1989, that Information was amended so that the acts complained of were combined into one count. The basis for the Information was the allegation that on April 11, 1989, the defendant fondled the vaginal area of a seven-

year-old girl while she was present at his Great Falls grocery store. The Information was based on statements made by the girl to her teacher after she arrived at school several hours late.

This case went to trial on September 11, 1989, and the jury returned its verdict on September 13, 1989, finding the defendant guilty of the crime charged.

Prior to sentencing, the usual pre-sentence investigation was conducted, including a psychological evaluation of the defendant. As a result of that investigation, the District Court found that the defendant was a 56-year-old widower who had raised four adult children [sic] and had an extensive history of full-time employment. He had no prior criminal record, nor was there any prior history of any complaints of similar conduct by the defendant.

The psychologist who examined the defendant, as part of the pretrial investigation, concluded that he was suffering from post-traumatic stress syndrome and was in a severely depressed state of mind. He recommended that the defendant not be incarcerated, but that he be involved in a mental health therapeutic program with psychiatric work and counseling.

Based upon its pre-sentence investigation, the District Court found that the defendant was not a dangerous person, that his offense was an isolated incident, and that it would not be repeated in the future. The court also found that the defendant was suffering from medical problems, and that incarceration in the State Prison was not an appropriate penalty.

The defendant's sentencing hearing was held on October 17, 1989. On that same date, the District Court

sentenced the defendant to five years in the Montana State Prison. However, execution of the sentence was suspended, except for the 35 days he had already served in the Cascade County Jail. He was placed on formal supervised probation under the rules and regulations of the Adult Probation and Parole Bureau and was ordered to enroll in a sexual therapy program at his own expense, and to continue in that program until it was no longer deemed necessary by his therapist. The specific sentence provision regarding sexual therapy was as follows:

> The defendant is to immediately enroll in a sexual therapy program at his own expense and continue said program until his therapist deems further counseling and therapy unnecessary. The Court would recommend that the defendant obtain his therapy at the sexual offender treatment program located in Helena, Montana.

As conditions of his suspended sentence, the defendant was also ordered to pay any counseling costs incurred by the victim and prohibited from being around children unless another adult was present.

On June 8, 1990, the County Attorney petitioned the District Court for revocation of the defendant's suspended sentence for two reasons: (1) the State contended that the defendant was not gainfully employed; and (2) the State alleged that the defendant had not completed the sexual treatment program which was a condition of his suspended sentence.

The defendant denied violating the terms of his suspended sentence, and an evidentiary hearing was conducted on August 31, 1990. At that hearing, the defendant's probation officer, and the counselor to whom

he had been referred for sexual therapy, testified. The defendant also testified on his own behalf.

The defendant testified that at that time he was living with his mother in Absarokee where he had moved following trial because he no longer had a business, a job, or any income.

He had interviewed for and sought work as an electrician, and as a custodian, but was unable to satisfy the physical requirements for either job. He suffered from high blood pressure and degenerative joint disease.

When unable to find employment, the defendant had applied for vocational rehabilitation through the State Department of Social and Rehabilitation Services. After an independent medical examination, he had apparently qualified for those services and was being retrained by SRS to do leather work which he was performing at his mother's home. He had sold some of the work and had orders for more items which he had been unable to complete.

He testified that in order to comply with the court's order regarding enrollment in a sex offender program he contacted his probation officer, who referred him to Mike Sullivan, a counselor in Billings, Montana. He scheduled and attended a number of counseling sessions, but was finally advised that he did not qualify for Sullivan's treatment program because he would not admit that he was guilty of the crime of which he had been charged and convicted. He then talked to Ron Silvers, the director of the sexual offender program in Helena, and was told that he would not be admitted to that program either.

Michael Sullivan testified that he is a licensed clinical social worker practicing in Billings, and was director of a

program known as South Central Treatment Associates. He has a bachelor's degree in psychology, a master's degree in associate work, and is a licensed social worker in the State of Montana. At the time of the defendant's hearing, Sullivan had been involved in the treatment of sexual offenders for approximately five years.

The defendant first saw Mr. Sullivan, by referral from his probation officer, on November 20, 1989, and saw him on five subsequent occasions over the next six months. Each appointment was scheduled by the defendant. The defendant attended every scheduled appointment. He was described by Sullivan as pleasant, friendly, never angry or abusive, and always punctual.

Sullivan performed a series of tests on the defendant. There were no indications in those tests that the defendant was capable of violent conduct. However, from those tests and his contacts with the defendant, Sullivan formed the impression that the defendant was not amenable to outpatient sexual offender treatment because he did not admit that he committed a sexual offense. Sullivan testified that the defendant's denial made it impossible for him to treat him in their program. He also testified that there was no other outpatient sexual therapy program in the State of Montana which would treat a sexual offender who denied that he was guilty of sexual misconduct.

He confirmed that after the defendant had been rejected from his program, the defendant had sought treatment from Ron Silvers at the sexual therapy program in Helena, and that he (Sullivan) had been contacted by Silvers to determine why the defendant had been unacceptable for the Billings program.

Sullivan recommended a form of inpatient treatment, which is more structured and continuous, because in such a program it is more difficult for a patient to maintain defensive postures, such as denial. He testified that the only inpatient treatment program in the State of Montana was the one at the Montana State Prison.

Based upon the foregoing evidence, the District Court found that the State's complaint about the defendant's lack of employment was not well founded. The court found that the defendant was making a bona fide effort to maintain employment and was actively pursuing vocational rehabilitation.

However, regarding the State's second basis for its petition to revoke the suspended sentence, the court made the following conclusion:

> The Court concludes that the defendant has violated the condition of his suspended sentence by not enrolling (not being amenable to treatment and hence, not acceptable into an out-patient treatment program) in a sex offender treatment program and said violation was proven by a preponderance of the evidence.
>
> . . . Because the only viable alternative is an in-patient treatment program, the Court concludes that the defendant's suspended sentence must be revoked and the defendant ordered to serve FIVE (5) years in the Montana State Prison with credit for 35 days.
>
> * * * *
>
> It is recommended to the Warden of the Prison that the defendant not be eligible for parole until he has completed the sexual offender treatment

> program at the Prison. However, it is also recommended that upon completion of the program, the defendant be considered for parole. The defendant is designated as a non-dangerous offender for parole eligibility purposes.

The defendant, through his attorney, objected at the time that the sentence was revoked on the grounds that the District Court was conditioning suspension of the defendant's sentence on an admission of guilt, and cited authority to the District Court that it could not force the defendant to plead guilty. The issue previously stated, therefore, was properly preserved for appeal.

DISCUSSION

While the District Court's order revoking the defendant's suspended sentence is predicated upon the defendant's failure to enroll in a sex offender treatment program, it is clear that the defendant's incarceration at the Montana State Prison is directly related to his refusal to admit that he committed a crime. The defendant made every other effort possible to enroll in and complete a sex offender treatment program. He sought a referral from his probation officer. He followed up that referral by scheduling not one, but six consecutive appointments. He attended every appointment in a timely fashion, and other than admitting his guilt, cooperated in every manner possible while at those appointments. When he was rejected by the counselor with whom he had spent six months, he tried to find another sex offender treatment program that would admit and treat him, and was rejected a second time. Finally, he was advised that there was no outpatient sex offender treatment program in Montana that would accept him.

It is clear that the only thing the defendant has failed to do is admit that he committed the crime for which he was convicted. Whether or not punishment can be augmented because of a defendant's refusal to admit guilt, even after he has been convicted, is a question on which the federal courts are not in agreement. Furthermore, this Court has made contradictory statements in answer to that same issue.

The majority of federal courts of appeal which have addressed this issue follow the decision of the United States Court of Appeals for the Fifth Circuit in Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).

In that case, prior to imposing sentence, the district court judge advised the defendant that if he confessed his guilt the court would take his confession into consideration in determining the length of his sentence, but that if he persisted in his denial of guilt, that denial would also be taken into account. Because the defendant chose to continue denying guilt, he was sentenced to the maximum term permitted by law. That sentence was vacated by the Fifth Circuit, based on its conclusion that the alternatives presented to the defendant violated his Fifth Amendment right not to be a witness against himself. The Court of Appeals acknowledged that the defendant had already been convicted, but pointed out:

> It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for new trial (including the opportunity to discover new evidence), appeal, petition for certiorari, and collateral attack. Indeed, appeal is now an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant.

> The two "ifs" which the district court presented to Thomas placed him in a terrible dilemma. If he chose the first "if," he would elect to forego all of the above-noted post-conviction remedies and to confess to the crime of perjury, however remote his prosecution for perjury might seem. Moreover, he would abandon the right guaranteed by the Fifth Amendment to choose not to be a witness against himself, not only as to the crime of which he had been convicted, but also as to the crime of perjury. His choice of the second "if" was made after the warning that the sentence to be imposed would be for a longer term than would be imposed if he confessed. From the record, it is clear that an ultimatum of a type which we cannot ignore or approve confronted Thomas. Truly, the district court put Thomas "between the devil and the deep blue sea."
>
> * * * *
>
> Thomas suffered the consequences for choosing the second "if" . . . in the form of a longer prison term. When Thomas received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty for exercising his constitutionally guaranteed rights. Upon this ground alone, we think that his sentence is "subject to collateral attack," and have *little* doubt as to the authority and duty of the district court to vacate the sentence.

Thomas, 368 F.2d at 945-46. In accord with Thomas, are Scott v. United States, 419 F.2d 264 (D.C.Cir. 1969); United States v. Laca, 499 F.2d 922 (5th Cir. 1974); United States v. Wright, 533 F.2d 214 (5th Cir. 1976). In Poteet v. Fauver, 517 F.2d 393 (3d Cir. 1975), the United States Court of Appeals for the Third Circuit concluded

that augmentation of a post-conviction sentence based on refusal to admit guilt violated the due process clause of the Fourteenth Amendment of the United States Constitution.

In the past, this Court has given apparent approval to the Thomas rule. Although the case of In the Matter of Jones, 176 Mont. 412, 578 P.2d 1150 (1978), was decided on other grounds, we cited with approval the following rule of law in that case:

> While the sentencing judge may take into account his belief that the defendant was not candid with the court this is to be distinguished from the rule that a sentence may not be augmented because a defendant refuses to confess or invokes his privilege against self-incrimination. *Fox v. State, (1977 Alaska), 569 P.2d 1335, 1338. See: United States v. Garcia,* (3rd Cir., 1976), 544 F.2d 681, 685; *United States v. Acosta,* (5th Cir., 1975), 509 F.2d 539, cert. denied, 423 U.S. 891, 96 S.Ct. 188, 46 L.Ed.2d 122 (1975); *United States v. Rogers,* (5th Cir., 1974), 504 F.2d 1079, 1085, cert. denied, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975).

The only Federal Circuit which appears to have arrived at a contrary conclusion is the Ninth Circuit.

In Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969), the Ninth Circuit Court of Appeals considered the Thomas decision and chose not to follow it. In that case, the defendant was also given a stiffer sentence because of his refusal to admit guilt after he was convicted, and challenged that sentence as a violation of his Constitutional privilege against self-incrimination. However, the Ninth Circuit, on balance, placed greater importance on the criminal justice system's objective of

rehabilitation, than on a defendant's continued right to deny guilt. In rejecting the Thomas rationale, the Ninth Circuit has stated:

> This case presents a dilemma which every trial judge faces at the time of sentence. It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault. In the present state of the criminal law, there is no doubt that punishment is still a consideration in the imposition of sentence, especially where non-violent or economic crimes are involved. But to the extent that rehabilitation is the objective, no fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence.
>
> * * * *
>
> Gollaher chose to insist upon his innocence. The judge, bound by the jury's verdict and apparently also being firmly convinced by the evidence that Gollaher was guilty, proceeded accordingly. He had before him a man unwilling to take the first step toward rehabilitation and he imposed sentence accordingly. Gollaher's Fifth Amendment rights were not infringed.

Gollaher, 419 F.2d at 530-31.

Our prior decision in State v. Donnelly, 47 St.Rep. 1600, 798 P.2d 89 (1990), appears to be in accord with the Ninth Circuit's decision in Gollaher. In Donnelly, we were asked to decide whether a defendant, who was already imprisoned at the Montana State Prison, was denied his right to avoid self-incrimination when he was denied

parole until he completed a sex offender course at the Prison. Interestingly, the evidence in that case was that in order to be accepted into the inpatient sexual offender program at the Prison, that defendant also had to admit that he committed the crime of which he was convicted. (Therefore, if the trial court's objective in this case was to obtain treatment for Donald Imlay, imprisonment does not appear to be the solution.) At any rate, we found that denying probation under those circumstances did not violate the defendant's privilege against self-incrimination. Our decision appears to have been based on the following conclusion:

> Here, defendant's decision to remain silent is a tactical one, not a compelled one. Defense counsel argues that, in reality, defendant's testimony is in fact compelled since it is a prerequisite for parole. It is possible the defendant may be paroled sooner if he admits to incest than if he remains silent. However, defendant may remain silent if he so chooses, and still possibly be paroled at some future date based on good behavior.
>
> Furthermore, failure to admit to incest will not result in certain penalty to defendant, it will only result to preserve his current ineligible parole status. In this case, the district court ordered that the defendant was ineligible for parole *until* the satisfaction of a condition subsequent. The condition subsequent is partially satisfied by defendant's successful completion of the sexual offender program at Montana State Prison. Failure to satisfy this condition subsequent, i.e., failure to satisfactorily complete the sex offender program, will not result in a penalty, but will

> merely result in defendant's continued ineligibility for parole.

Donnelly, 47 St.Rep. at 1607-08, 798 P.2d at 96.

Without debating the merits of the foregoing conclusion from Donnelly, it is clear that in this case the defendant is being subjected to a penalty that he would not otherwise be subjected to if he would simply admit his guilt. That penalty is that he serve time in the Montana State Prison.

Even though the defendant has already been convicted of the crime that he denies, our system still provides, as noted in the Thomas decision, for opportunities to challenge that conviction. For example, the defendant still had the right to challenge his conviction, based on newly discovered evidence, or by collateral attack. These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered meaningless if the defendant could be compelled to admit guilt as a condition to his continued freedom. Furthermore, while such a defendant would be foreclosed from invoking the protection of such procedures to establish his innocence, the reliability of an admission of guilt under such circumstances would be highly suspect. In addition, by admitting guilt in this case, the defendant would have to abandon his right guaranteed by the Fifth Amendment, not only as to the crime for which he has been convicted, but also to the crime of perjury. He testified in his own defense during this trial and denied committing the offense with which he was charged.

Under these circumstances, and absent any grant of immunity, we believe that the better reasoned decisions are those decisions which protect the defendant's constitutional right against self-incrimination, and which

prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination. To the extent that our decision in Donnelly is inconsistent with this opinion, that part of the Donnelly decision is overruled.

The sentence of the District Court is vacated and this case remanded to the District Court for further proceedings not inconsistent with this opinion.

/s/ Terry Trieweiler
Justice

We Concur:

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison
/s/ William E. Hunt Sr.
/s/ R. C. McDonough
Justices

MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

THE STATE OF MONTANA)	CAUSE NO.
Plaintiff,)	CDC-89-109
)	
vs)	
)	JUDGMENT OF
DONALD GLENN IMLAY,)	CONVICTION AND
Defendant.)	SENTENCING ORDER

On October 17, 1989, the above named defendant, DONALD GLENN IMLAY, personally appeared in Court for the purpose of being Sentenced herein. Other appearances were as follows: the defendant's attorney Billy Miller and Deputy Cascade County Attorney Kim Schulke. The defendant was found GUILTY after a Jury Trial of the offense of SEXUAL ASSAULT, A FELONY which involved a juvenile girl. At the time that the jury verdict was returned the Court revoked the defendant's bail and ordered that he be held in custody pending Sentencing. A Pre-Sentence Investigation was ordered and Sentencing scheduled for this time. The Court has received the Pre-Sentence Investigation which was prepared by the Adult Probation and Parole Bureau of Great Falls, and furnished a copy thereof to both counsel prior to Sentencing. The Court notes that 36 letters have been presented to the Court in connection with this Sentencing hearing. Additionally a psychological evaluation report prepared by Charles E. Jones has been filed with the Court. The County attorney filed a letter from the Mental Health Services Inc., together with standards for a Sex Offender Evaluation.

The County Attorney did not call any witnesses prior to Sentencing. The defendant's attorney called three witnesses to testify prior to sentencing.

Both the County Attorney and the defendant's attorney made a Sentencing recommendation to the Court.

The defendant was given an opportunity to make any statement or comments he wished prior to sentencing and he did make a statement to the court expressing sorrow for the criminal offense for which he was found guilty.

There was no legal reason shown why Sentencing should not be pronounced at this time.

The Court has considered the following matters in Sentencing this defendant.

The defendant was found guilty after a jury trial of sexually assaulting a juvenile girl at the Parkdale Grocery in Great Falls, Montana on April 11, 1989. The defendant has been incarcerated in the Cascade County jail for a period of 35 days. The defendant is 56 years of age and is a widower who has raised four children who are now adults. The defendant is presently unemployed but does have an extensive history of full time employment. The defendant has no military history. The Pre-Sentence report recommends that restitution be paid for any psychological or psychiatric expenses incurred by the victim, plus repayment to the Crime Victims Program for payments that have been made on behalf of the victim.

The defendant does not have a prior criminal record of either misdemeanors or felonies.

The defendant's wife of 36 years died of cancer in 1986. The defendant completed High School and has completed numerous vocational courses by correspondence.

The defendant's past employment history is noteworthy; he has worked on farms and ranches; he has worked at a lumber yard and sawmill; he has worked for the Great Northern and Northern Pacific Railroads; he has worked 19-1/2 years for the Anaconda Mining Company in Great Falls; he has worked for Moat Industries; and he is a member in good standing with the Electricians Local Union; and is owner and operator of Parkdale Grocery in Great Falls for a number of years.

Mr. Imlay was evaluated by Charles E. Jones on September 29, 1989. Dr. Jones administered a psychodiagnostic evaluation and administered various tests. The report indicates that the defendant has no previous psychiatric treatment or consultation and there is no evidence of prior behavioral treatment. The defendant is not an alcoholic and does not use dangerous drugs. Dr. Jones placed the defendant in the middle 50% of the population in IQ achievement. The defendant was diagnosed by Dr. Jones as having Post Traumatic Stress Syndrome. The report indicates that there is no latent or bizarre psychotic episodes and there are no sexual connotations in his test results. The defendant is presently experiencing a regressive and mentally depressive state of mind and a sense of no where to turn. In view of the defendant's disturbed depressive condition, Dr. Jones does not recommend any further incarceration. The recommendation of Dr. Jones is a mental health therapeutic program of psychiatric work and counseling.

The recommendations for Sentencing in this case range from a recommendation from the County Attorney

and the victim's mother to 20 years in the Montana State Prison to the defendant's attorney's recommendation of a five year Suspended Sentence. The Court has observed the defendant in the various proceedings in the courtroom and is cognizant of the many letters that have been received by friends of the defendant which are all very supportive of the defendant. The defendant has no prior criminal history and does not abuse alcohol or use dangerous drugs. The Court accepts the representations of the defendant's attorney that this defendant is not a dangerous person and that the present offense was an isolated incident which will not be repeated in the future. The Court concludes that a period of incarceration in the Montana State Prison is not appropriate in this case but rather a Suspended Sentence with supervised probation and expressed conditions would be the appropriate Sentence. The Court also is cognizant of the age of the defendant (56) and the fact that this defendant is presently suffering from some medical problems.

THEREFORE, IT IS HEREBY ORDERED that the defendant, DONALD GLENN IMLAY, is Sentenced to serve FIVE (5) years in the Montana State Prison. However, the execution of said Sentence is hereby Suspended except for the first 35 days thereof. The defendant is ordered to serve 35 days in the Cascade County jail but is given credit for the 35 days he has previously been incarcerated. During the Suspended portion of the Sentence the defendant shall be on formal supervised [sic] with the adult Probation and Parole Bureau of Great Falls and subject to their rules and regulations. In addition thereto the defendant shall be under the following conditions during the Suspended Sentence:

1. The defendant is to immediately enroll in a sexual therapy program at his own expense and continue

said program until his therapist deems further counseling and therapy unnecessary. The Court would recommend that the defendant obtain his therapy at the Sexual Offender Treatment Program located in Helena, Montana.

2. The defendant is required to pay for all psychological and psychiatric counseling costs incurred by the victim in this case. Additionally, the defendant is required to pay restitution for any monies spent by the Montana Crimes [sic] Victims Program which were incurred by the victim. The amount of said resitution [sic] shall be determined by the defendant's probation officer and a repayment program established so that the defendant may pay the restitution in installments. All payments are to be made to the Clerk of District Court, Cascade County Courthouse, Great Falls, Montana.

3. The defendant is prohibited from being alone with any minor female child [sic] unless there is another adult present at all times.

IT IS FINALLY ORDERED that pursuant to Section 46-18-236 MCA, the mandatory statutory surcharge of $20.00 is hereby assessed against this defendant. Said amount is to be paid to the Clerk of District Court, Cascade County Courthouse, Great Falls, Montana, as soon as possible.

DATED this 18th day of October, 1989.

/s/ Joel G. Roth
DISTRICT JUDGE

cc: County Attorney/Schulke
Billy Miller
Defendant
Adult Probation & Parole
Cascade County Sheriff

MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE MONTANA

THE STATE OF MONTANA	)	CAUSE NO.
Plaintiff,	)	CDC-89-109
	)	
vs	)	ORDER REVOKING
DONALD GLENN IMLAY,	)	SUSPENDED SENTENCE
Defendant.	)	AND SENTENCING
	)	ORDER

On June 13, 1990, the State, through the Cascade County Attorney, filed herein a Petition to Revoke the Suspended Sentence of defendant, Donald Glenn Imlay.

On July 6, 1990, the defendant personally appeared in Court and answered NOT TRUE to the alleged violations set forth in the Petition to Revoke.

An evidentiary hearing was held on August 31, 1990, on said Petition to Revoke Suspended Sentence. Appearances at the hearing were as follows: the defendant, Donald Glenn Imlay; the defendant's attorney Billy Miller; and Deputy Cascade County attorneys Kim Schulke and Lisa Bazant.

The State called two witnesses who were sworn and testified: Barbara Nihill and Michael D. Sullivan. The defendant was sworn and testified.

Following the presentation of the testimony and the admission into evidence of the defendant's exhibit "A: (a schedule of the defendant's earnings from his leather work in August 1990), both Kim Schulke and Billy Miller orally argued the Petition to Revoke and made sentencing recommendations.

The following shall constitute the Court's Findings of Fact and Conclusions of Law and Order herein.

The defendant was found guilty of Sexual Assault, a Felony, involving a minor female girl [sic] after a jury trial herein which concluded on September 13, 1989.

The defendant was sentenced on October 17, 1989 to FIVE (5) years in the Montana State Prison with the execution of all of said sentence suspended except the first 35 days. The defendant was ordered to serve 35 days in the Cascade County jail but given credit for 35 days he had been incarcerated. The defendant was placed on formal supervised probation with the Adult Probation and Parole Bureau of Great Falls, Montana. An additional condition (along with others which are not involved herein) imposed by the Court, was that the defendant was to immediately enroll in a sexual thereapy [sic] program at his own expense and continue said program until his therapist deems further counselling and therapy unnecessary.

The Petition to Revoke alleged two violations of conditions of the suspended sentence. The first related to the requirement that the defendant seek and maintain employment or maintain a program approved by the Adult Probation and Parole Bureau. The evidence presented with respect to said alleged violation established that the defendant had applied for employment as an electrician at the mines around Absorkee [sic], Montana, where he resided with his mother. However, because of the defendant's physical condition (he was under doctor's orders not to walk) he was denied employment. The defendant also applied for a job of custodian with the Absorkee school district, but was also denied employment there. (for the same reason) The defendant began working with the Department of Social and Rehabilitation

Services and was accepted in a program of vocational-rehabilitation involving leather work. The department paid for a correspondence course in leather work and also furnished some tools to the defendant. The defendant began performing leather work under the program and sold $320.00 of leather goods in August 1990. The defendant had applied for disability benefits while on probation but said requested benefits were denied. The defendant's supervising probation officer, Barbara Nihill, testified that the defendant did not have steady employment and his working time was not supervised.

The Court concludes that the defendant was making a bona fide effort to obtain employment and was accepted into a vocational-rehabilitation program and was actively pursuing said program. The Court concludes that the State has failed to establish by a preponderance of the evidence that the defendant was in violation of State Rule #4 which required that the defendant seek and maintain employment.

The second alleged violation related to the condition that the defendant immediately enrol [sic] in a sexual offender thereapy [sic] program. State's witness, Michael D. Sullivan, a licensed social worker, testified with regard to that condition. The defendant was referred to Mr. Sullivan by his supervising probation officer, Barbara Nihill. Sullivan is a co-director of South Central Teatment [sic] Associates in Billings, Montana, which provides a therapy program on an out-patient basis for sex offenders. The defendant and Sullivan met six times between November 20, 1989 and March 23, 1990 for a total of approximately 5½ hours. The defendant was not accepted into the program in Billings because he (the defendant) continued to deny the sexual assault of which he had been found guilty. In fact, during the defendant's testimony at this evidentiary hearing, he denied the sexual assault. The

sex offender thereapy [sic] program in Billings will not accept a person for therapy who denies commission of the sex offense.

The defendant also contacted Ron Silvers who is in charge of the Sexual Offender Treatment Program in Helena in order to apply for admission to that program. However, the evidence established that he was not accepted into that program either, apparently for the same reason as his non-acceptance into the Billings program. The testimony of Sullivan established that there are no out-patient sex offender treatment programs that will accept a person who denies having committed the sexual offense.

The only in-patient sex offender treatment program is located inside the prison at the Montana State Prison.

The Court concludes that the defendant has violated the condition of his suspended sentence by not enrolling (not being amenable to treatment and hence, not acceptable into an out-patient treatment program) in a sex offender treatment program and said violation was proven by a preponderance of the evidence.

After the filing of the Petition to Revoke Suspended Sentence, the Court received numberous [sic] letters from the defendant's family and friends, all supportive of the defendant. However, the court must accept the guilty verdict of the jury. The defendant's continuing denial of guilt forecloses his acceptance into an out-patient sex offender treatment program. However, the most important condition on the defendant's suspended sentence was that one relating to his immediate enrolling in a sex offender treatment program. Because the only viable alternative is an in-patient treatment program, the Court concludes that the defendant's suspended sentence

must be revoked and the defendant ordered to serve FIVE (5) years in the Montana State Prison with credit for 35 days.

THEREFORE, IT IS HEREBY ORDERED that the defendant's FIVE (5) year Suspended Sentence is revoked.

IT IS ALSO ORDERED that the defendant is sentenced to serve FIVE (5) years in the Montana State Prison with credit for 35 days already served.

It is recommended to the Warden of the Prison that the defendant not be eligible for parole until he has completed the sexual offender treatment program at the Prison. However, it is also recommended that upon completion of the program, the defendant be considered for parole. The defendant is designated as a non-dangerous offender for parole eligibility purposes.

IT IS FINALLY ORDERED that the defendant is remanded to the custody of the Cascade County Sheriff for transportation to the Montana State Prison.

DATED this 4th day of September, 1990.

/s/ Joel G. Roth
District Judge

cc: County Attorney/Schulke
Billy Miller
Defendant
Cascade County Sheriff
Adult Probation and Parole Bureau
Warden/Montana State Prison
St. ID
GFPD

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 90-493

STATE OF MONTANA,	)	
	)	
Plaintiff and Respondent,	)	
	)	**ORDER**
-v-	)	
	)	
DONALD GLENN IMLAY,	)	
	)	
Defendant and Appellant.	)	

Respondent, State of Montana, has filed with this Court a Petition for Rehearing, and Appellant, Donald Glenn Imlay, has filed his Objection to Respondent's Petition for Rehearing.

The Court having read and considered the Respondent's petition and Appellant's objections thereto,

IT IS HEREBY ORDERED that the Respondent's petition for rehearing is denied.

DATED this 23rd day of July, 1991.

/s/ J. A. Turnage
/s/ Terry Trieweiler
/s/ R. C. McDonough
/s/ William E. Hunt Sr.
/s/ John Conway Harrison
Justices

Supreme Court, U.S.
FILED
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(3)

No. 91-687

In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

BILLY B. MILLER
Counsel of Record
600 Central Plaza, Ste. 300
Great Falls, MT 59401
(406) 727-5990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Montana Supreme Court had the authority to act Sua Sponte in deciding that Respondent's Fifth Amendment right against self incrimination had been violated?

2. Whether a probationer's Fifth Amendment right against self incrimination as applied to the states through the Fourteenth Amendment is violated by compelling the probationer, as a condition of a suspended sentence, to admit that he is guilty of the crime for which he has been accused and convicted?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

G. Russell Chambers, 59 U.S. L.W. 4595 (1991) 1

Garrity v. New Jersey, 385 U.S. 493 (1967) 6

Gollaher v. United States, 419 F. 2d 520 (9th Cir. 1969) 5, 6, 7

Poteet v. Feuver, 517 F. 2d 393 (3rd Cir. 1975) 3, 5

State v. Donnelly, 47 St. Rep. 1600, 798 P. 2d 89 (1990) 3, 4

Thomas v. United States, 368 F. 2d 941 (5th Cir. 1966) 1, 3, 4

United States v. Acosta, (5th Cir. 1975) 509 F. 2d 539 4

United States v. Chaidez-Castro, (7th Cir. 1970) 430 F. 2d 766 7

United States v. Garcia, (3rd Cir. 1976) 544 F. 2d 681, 685 4

United States v. Rodriguez, 498 F. 2d 302 (5th Cir. 1974) 5

United States v. Rogers, (5th Cir. 1974), 504 F. 2d 1079 .....4, 7

United States v. Vermeulen, (2nd Cir. 1970) 436 F. 2d 72 7

Wright v. United States, 533 F. 2d 214 (5th Cir. 1976) 6

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the case with the exception of one critical point. The Respondent, by raising the issues of vagueness and inequity in its brief on appeal made the Fundamental Fairness Doctrine one of the focal points of the argument.

SUMMARY OF ARGUMENT

This Court should deny the Petition for Writ of Certiorari because the Montana Supreme Court not only has the authority to act *Sua Sponte*, but in following the decision in *Thomas v. United States*, 368 F. 2d 941 (5th Cir. 1966), the Montana Supreme Court is in agreement with the majority of Federal Courts of Appeal which have addressed this Fifth Amendment issue.

ARGUMENT

1. THE MONTANA SUPREME COURT HAS THE AUTHORITY TO ACT *SUA SPONTE* BECAUSE OF ITS INHERENT POWER.

The Montana Supreme Court, upon reviewing Respondent's brief on appeal found that the issues raised by the Respondent were sufficient for the court to act on its own motion in establishing that his Fifth Amendment right against self incrimination had been violated.

In addressing this issue in *G. Russell Chambers v. Nasco, Inc.*, 59 U.S. L.W. 4595 (1991) the United States Supreme Court stated that:

> "The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

It is clear from this decision that courts have great leeway in the manner in which they may expeditiously dispose of their cases. Therefore, it is the contention of the Respondent that Petitioner's inference in its Writ regarding the lack of authority of the court to act on its own motion is without merit and does not require any additional argument from Respondent.

2. THE PROBATIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT WAS VIOLATED BY COMPELLING HIM, AS A CONDITION OF HIS SUSPENDED SENTENCE, TO ADMIT THAT HE IS GUILTY OF THE CRIME FOR WHICH HE HAD BEEN ACCUSED AND CONVICTED.

The revocation of Respondent's probationary sentence by the District Court effectively augmented his post-conviction sentence because he would not waive his right against self incrimination. At the time of sentencing the court was aware that Respondent continued to maintain his innocence. The court was also aware that in order for the Respondent to comply with the condition contained in the sentencing order, he was required to waive his Fifth Amendment right against self incrimination. Revoking the Respondent's suspended sentence because

of his refusal to waive this right is clearly in conflict with the decision in *Thomas*, supra and the majority of the other Federal Courts which have addressed this issue since the *Thomas* decision.

One of the many Federal Courts which have addressed this issue is the 3rd Circuit Court of Appeal. In *Poteet v. Fauver*, 517 F. 2d 393 (3rd Cir. 1975), the trial court gave the defendant a harsher sentence after a jury had found him guilty because he refused to waive his Fifth Amendment right to maintain his innocence. In reversing the sentence, the Appeals Court concluded that augmentation of a post-conviction sentence based on refusal to admit guilt violated the due process clause of the Fourteenth Amendment of the United States Constitution. This 3rd Circuit decision is a direct result of the 5th Circuit's decision in *Thomas*, supra, which is being relied on by the Respondent.

The Imlay appeal did not present a case of first impression before the Montana Supreme Court. In *State v. Donnelly*, 47 St. Rep. 1600, 798 P.2d 89 (1990) the defendant was found guilty of incest by a jury. The District Court declared the defendant ineligible for parole until the successful completion of the sexual offender program at the Montana State Prison and the subsequent acceptance of the defendant into an aftercare program. An appeal was filed by the defendant. One of the issues raised was that his Fifth Amendment rights had being violated by compelling him to admit his guilt before he could attempt to comply with the condition of the sentencing order.

The Montana Supreme Court in *Donnelly,* supra at page 96, upheld the District Court's decision by ruling that placing a condition on the defendant to complete a sexual offender program in prison before being eligible for parole was not a violation of defendant's Fifth Amendment rights because, "his decision to remain silent was a tactical one, not a compelled one."

It is unclear whether the Montana Supreme Court took *Thomas,* supra, under consideration at the time of making the decision in *Donnelly,* supra. However, from the language in *Imlay* it is apparent that the impact of *Thomas,* supra, along with the decisions in *United States v. Garcia,* (3rd Cir. 1976), 544 F. 2d 681, 685; *United States v. Acosta,* (5th Cir. 1975), 509 F. 2d 539; and *United States v. Rogers,* (5th Cir. 1974), 504 F. 2d 1079, contributed to the Supreme Court to overturn its previous decision in *Donnelly,* supra. In *Imlay,* supra, the court found that the defendant paid a judicially imposed penalty for exercising his constitutional right to maintain his innocence.

In *Imlay,* supra, on page 14a of Petitioner's Writ of the Montana Supreme Court justified its reinterpretation of a defendant's rights under the Fifth Amendment by stating:

"Even though the defendant has already been convicted of the crime that he denies, our system still provides, as noted in the decision, for opportunities to challenge that conviction for example, the defendant still had the right to challenge his conviction, based on a newly discovered evidence, or by collateral attack. These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered

meaningless if the defendant could be compelled to admit guilt as a condition to his continued freedom. Furthermore, while such a defendant would be foreclosed from invoking the protection of such procedure to establish his innocence, the reliability of such admission of guilt under such circumstances would be suspect."

The Montana Supreme Court's reinterpretation of a defendant's Fifth Amendment right against self incrimination is in total agreement with the decision in *United States v. Rodriguez*, 498 F. 2d 302 (5th Cir. 1974), in which the court stated that "A defendant retains important Fifth Amendment rights after the jury reaches a verdict, rights which must not be made the price of sentencing leniency. The court cannot place the defendant in the dilemma of either abandoning his Fifth Amendment rights or risking a harsher sentence."

The Montana Supreme Court, in deciding *Imlay*, realized that the decision of the Ninth Circuit in *Gollaher v. United States*, 419 F. 2d 520 (9th Cir. 1969), and its decision in *Donnelly*, supra, could possibly cause perjury charges to be brought against Respondent once he waives his Fifth Amendment rights, thereby forcing him to provide the rope for his own hanging. In reviewing the decision in *Poteet*, supra, it is clear this court was also concerned about the defendant's ability to defend himself once he has waived his Fifth Amendment rights. The court stated on page 394 that, "Imposition of more severe punishment where a defendant is found guilty following a jury trial, and does not admit his guilt, must be disapproved in that use of such procedure would unduly burden defendant's right to defend."

The Petitioner is asking this court to grant its Petition for Writ of Certiorari by relying mainly on the Ninth Circuit Court of Appeals' decision in *Gollaher,* supra. In this case the defendant was convicted of filing false statements and conspiracy and the court rebuked the defendant for failure to confess crimes for which he was convicted. The court took such failure into consideration in setting sentence. On appeal the Ninth Circuit decided that the defendant's Fifth Amendment right against self incrimination had not been violated because by the defendant's refusal to admit guilt, he was unwilling to take the first step towards rehabilitation. This decision not only destroys the basic rights of the Respondent to maintain his innocence, but such a decision also is contrary to the majority of Federal Courts that have addressed this issue.

The United States Supreme Court in *Garrity v. New Jersey,* 385 U.S. 493 (1967), made it clear that there are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. In Respondent's argument against granting Petitioner's Writ it is his position that his Fifth Amendment right against self incrimination is one of these protected rights. Therefore, to permit the lower court to demand a price of such constitutional magnitude from Respondent in exchange for his probationary sentence would clearly be in violation of his Fifth Amendment right against self incrimination.

Petitioner's position of reliance on *Gollaher* was rejected by the Fifth Circuit Court of Appeals in *Wright v. United States,* 533 F. 2d 214 (5th Cir. 1976). In its decision, the court stated on (page 216) that, "A defendant does not

lose his right to appeal or to continue to assert his innocence simply because of a jury verdict of guilty." The court in *Rogers*, supra, on page 1085, went even further in rejecting the Ninth Circuit's decision. The court found that the defendant's Fifth Amendment rights had been violated when he was given a harsher sentence because he refused to waive his right against self incrimination. The court stated that, "We think that this result is mandated by Fifth Amendment considerations and we therefore decline to align ourselves with the differing views expressed in *United States v. Vermeulen*, (2nd Cir. 1970) 436 F. 2d 72; *United States v. Chaidez-Castro* (7th Cir. 1970) 430 F. 2d 766; and *Gollaher v. United States* (9th Cir. 1969)."

CONCLUSION

For the reasons presented above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BILLY B. MILLER
Counsel of Record
600 Central Plaza, Ste. 300
Great Falls, MT 59401
(406) 727-5990

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No. 91-687

In The
Supreme Court of the United States
October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Petition for a Writ of Certiorari to The Montana Supreme Court

PETITIONER'S REPLY BRIEF

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Allen v. Illinois,
478 U.S. 364 (1986) 2

Brown v. Walker,
161 U.S. 591 (1896) 4

Commonwealth v. Rodgers,
372 A.2d 771 (Pa. 1977) 5

Commonwealth v. Strickler,
393 A.2d 313 (Pa. 1978) 5

Gall v. Commonwealth,
702 S.W.2d 37 (Ky. 1985) 4

McQueen v. Commonwealth,
721 S.W.2d 694 (Ky. 1986) 4

Murphy v. Minnesota,
465 U.S. 420 (1984) 2-4

Reina v. United States,
364 U.S. 507 (1960) 3, 4

Rogers v. United States,
340 U.S. 367 (1951) 4

State v. Burow,
394 N.W.2d 665 (Neb. 1986) 3

State v. Verdugo,
602 P.2d 472 (Ariz. 1979) 4

Thomas v. United States,
368 F.2d 941 (5th Cir. 1966) 2, 3, 6

United States v. Gonzalez-Mares,
752 F.2d 1485 (9th Cir. 1985) 3

United States v. Heldt,
668 F.2d 1238 (D.C. Cir. 1981) 4

United States v. Mourning,
914 F.2d 699 (5th Cir. 1990) 3

Wilson v. State,
621 P.2d 1173 (Okla. Crim. App. 1980) 3

OTHER AUTHORITIES

McCormick on Evidence
§ 121. 7

United States Constitution
Amendment V. 3, 4

United States Sentencing Guidelines
§ 3E1.1 4

No. 91-687

IN THE

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October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Petition for a Writ of Certiorari to The Montana Supreme Court

PETITIONER'S REPLY BRIEF

The brief filed by the respondent, Donald Imlay, simply reiterates the erroneous reasoning of the Montana Supreme Court, ignoring, as the state court did, the controlling authority defining the scope of the privilege against self-incrimination. If such reasoning is left to prevail and considered persuasive authority by other forums, treatment for criminal offenders will be severely restricted.

I.

The state court and the respondent have disregarded controlling considerations and precedent, and instead have relied upon the outdated and readily distinguishable case of *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). In *Thomas*, and the other similar cases relied upon by the Montana Supreme Court and the respondent, the setting was a defendant's allocution, at which a defendant is given the chance to speak before sentence is imposed. These cases all involved defendants who were pressured by a sentencing judge while in a courtroom to either confess or accept a harsher sentence. The actions of the sentencing judges were criticized in these cases because the coercive and threatening circumstances were viewed as compelling the defendants to either confess or suffer the penalty of a harsher sentence.

In this case the statements were requested in a treatment setting. Imlay was not placed inquisitorially before a sentencing judge and told to confess or else go to prison. He was given a suspended sentence in the hopes that he would be amenable to treatment and possibly rehabilitated. It is for this reason that the discussion of the Fifth Amendment privilege in *Allen v. Illinois*, 478 U.S. 364 (1986), is controlling. *See* Pet. at 13-15.

This case is also distinguishable from *Thomas* because Imlay did not assert his Fifth Amendment privilege prior to sentencing, but after he began serving his sentence. Imlay has never attacked his conviction. The matter surfaced during an appeal before the Montana Supreme Court concerning the propriety of the revocation of his probation. Given this distinction, *Murphy v. Minnesota*, 465 U.S. 420 (1984), not *Thomas*, is controlling. *See also*

United States v. Gonzalez-Mares, 752 F.2d 1485, 1489-90 (9th Cir. 1985) (citing *Murphy* for the general rule that a probationer is not entitled to invoke the privilege against self-incrimination in response to questions about probation status); *Wilson v. State*, 621 P.2d 1173 (Okla. Crim. App. 1980) (revocation proceeding is not a criminal proceeding for Fifth Amendment purposes); *State v. Burow*, 394 N.W.2d 665, 667 (Neb. 1986) (quoting *Murphy* and holding that the privilege against self-incrimination affords no protection in a probation revocation proceeding).

Moreover, as discussed in the petition, the significance of *Thomas* and similar older cases is notably diminished in light of the adoption of the federal sentencing guideline which allows for a reduction of the sentence for acceptance of responsibility by a defendant. *See* § 3E1.1, U.S.S.G.; *United States v. Mourning*, 914 F.2d 699 (5th Cir. 1990); Pet. at 10, n.10.

II.

Quoting the Montana Supreme Court, the respondent maintains that Imlay was placed in a coercive situation because he would be abandoning the opportunity to challenge his conviction through newly discovered evidence or through collateral attack if he were to discuss the crime during sex offender treatment. Imlay Br. at 5. Such an assertion ignores the general rule that once a person is convicted of a crime, he no longer may assert the privilege against self-incrimination with regard to those acts because he can no longer be incriminated by his testimony about the crime. *Reina v. United States*, 364 U.S. 507, 513 (1960).

This Court has long held that the threat of incrimination must be "real and appreciable." *Brown v. Walker*, 161 U.S. 591, 599-600 (1896); *Rogers v. United States*, 340 U.S. 367, 374-75 (1951). *Murphy, supra*, echoes this reasoning in holding that the threat of probation revocation would be permissible "if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding." (Emphasis added.) 465 U.S. at 435, n.7. Here, there is no real and appreciable threat of incrimination in a separate criminal proceeding because the information sought in treatment concerned only the crime for which Imlay had been convicted. Nor is there a realistic possibility of Imlay challenging the conviction through discovery of new evidence.

While this Court has not directly resolved the issue of whether the privilege of self-incrimination extends to collateral attacks, the Supreme Court of Kentucky has firmly held that it does not. In *McQueen v. Commonwealth*, 721 S.W.2d 694, 703 (Ky. 1986), and *Gall v. Commonwealth*, 702 S.W.2d 37, 45 (Ky. 1985), the Kentucky Supreme Court relied upon the general rule enunciated in *Reina, supra*, and held that a petitioner was not entitled to invoke the privilege against self-incrimination in a postconviction or collateral attack. *See also United States v. Heldt*, 668 F.2d 1238, 1253 (D.C. Cir. 1981) (grand jury witness may not invoke privilege of self-incrimination with respect to crimes of which he was already convicted).

Two states have taken the approach that resolution of the issue must be determined on a case-by-case basis and turns upon whether there is a "real and appreciable" danger of self-incrimination that would jeopardize collateral relief. *State v. Verdugo*, 602 P.2d 472 (Ariz.

1979) (threat of incrimination was "imaginary and insubstantial" because the appellant's conviction had been affirmed on appeal four years earlier, no petition for postconviction relief had been filed, and defense counsel estimated that the likelihood of success on collateral attack was only 15 to 30 percent); *Commonwealth v. Rodgers*, 372 A.2d 771 (Pa. 1977) (determination of whether witness whose conviction has been finalized on appeal and who is preparing a collateral attack may invoke privilege against self-incrimination is left to discretion of trial court); *Commonwealth v. Strickler*, 393 A.2d 313 (Pa. 1978); *see also McCormick on Evidence* § 121, at 290-91 (3d ed. 1984).

While the State of Montana maintains that the Kentucky decisions are correct, and that Imlay may no longer invoke the privilege against self-incrimination with respect to the crime for which he was convicted, there is also no realistic threat of self-incrimination through Imlay's seeking collateral relief. Imlay has never challenged his conviction. His appeal to the Montana Supreme Court involved solely a challenge to his sentence and the revocation of his probation. Because he has never challenged his guilt, no harm can result from discussion of the crime for which he was convicted and there can be no real or substantial threat to the privilege against self-incrimination in collateral proceedings.

The privilege against self-incrimination is not based upon some ethereal possibility. The threat to the privilege must be both real and substantial. There has never been an indication or even a suggestion that such a threat exists in this case. The Montana Supreme Court's concern about collateral relief is not a significant, much less controlling, consideration.

III.

The importance of review in this case is highlighted by the Montana Supreme Court's disregard of controlling federal precedent on the privilege against self-incrimination. By erroneously applying the *Thomas* decision to this case the Montana court has placed itself in conflict with decisions of this Court, other state courts, and numerous federal circuit courts, including the Ninth Circuit Court of Appeals.

Moreover, the effect of the state court's decision on treatment programs in the State of Montana and throughout the nation is potentially monumental. To legally prevent treatment programs from requiring discussion of pertinent behavior strips from the programs their most effective tool of breaking through the denial that so often accompanies the behavior. The result of the state court's decision is that offenders will be warehoused and meaningful treatment will be precluded. Review of the Montana Supreme Court's decision is therefore necessary to preserve and protect a criminal defendant's opportunity for effective treatment and rehabilitation, and to affirm a state's prerogative to promote and require such treatment.

CONCLUSION

For these reasons, the reasons articulated in the petition, and the reasons set forth by the 20 states who have joined Montana as *amici curiae* in this matter, the State of Montana requests the writ to issue.

Respectfully submitted,

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

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In The
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STATE OF MONTANA,

Petitioner,

v.

DONALD G. IMLAY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER STATE OF IDAHO JOINED BY: ALASKA, ARIZONA, CONNECTICUT, DELAWARE, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEVADA, NORTH DAKOTA, PENNSYLVANIA, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WYOMING

Larry EchoHawk
Attorney General
of the State of Idaho
* John J. McMahon
Chief Deputy Attorney General
Statehouse, Room 210
Boise Idaho 83720
Telephone: (208)334-2400

* *Counsel of Record*

Charles E. Cole
Attorney General
State of Alaska

John J. Kelly
Chief State's Attorney
State of Connecticut

Charles M. Oberly, III
Attorney General
State of Delaware

Linley E. Pearson
Attorney General
State of Indiana

Robert T. Stephan
Attorney General
State of Kansas

Frederic J. Cowan
Attorney General
State of Kentucky

Michael E. Carpenter
Attorney General
State of Maine

J. Joseph Curran, Jr.
Attorney General
State of Maryland

William L. Webster
Attorney General
State of Missouri

Frankie Sue Del Papa
Attorney General
State of Nevada

Nicholas J. Spaeth
Attorney General
State of North Dakota

Ernest D. Preate, Jr.
Attorney General
Commonwealth of
Pennsylvania

Jorge E. Pérez Díaz
Solicitor General
Commonwealth of
Puerto Rico

T. Travis Medlock
Attorney General
State of South Carolina

Mark Barnett
Attorney General
State of South Dakota

Paul Van Dam
Attorney General
State of Utah

Jeffrey L. Amestoy
Attorney General
State of Vermont

Mary Sue Terry
Attorney General
Commonwealth of
Virginia

Joseph B. Meyer
Attorney General
State of Wyoming

TABLE OF CONTENTS

Page

INTERESTS OF *AMICI CURIAE* STATES 1

SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING THE WRIT

I. The Montana Supreme Court Erroneously Applied Fifth Amendment Protections to a Treatment Situation 2

II. Failure by a Court to Recognize the Legal Propriety and Therapeutic Necessity of Requiring Discussion of Criminal Acts During Treatment Jeopardizes Any and All Treatment Programs Which Require Acceptance of Responsibility by an Offender. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Allen v. Illinois,
478 U.S. 364 (1986) 3, 8

Asherman v. Meachum,
932 F.2d 137 (2d Cir. 1991),
reh'g en banc pending 3

Baxter v. Palmigiano,
425 U.S. 308, 96 S. Ct. 1551 (1976) 4

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 7

Lefkowitz v. Cunningham,
431 U.S. 801 (1977) 4

Lefkowitz v. Turley,
414 U.S. 70 (1973) 4, 5

McQueen v. Commonwealth,
721 S.W.2d 694 (Ky. 1986),
cert. denied, 481 U.S. 2203 (1987) 6

Minnesota v. Murphy,
465 U.S. 420 (1984) 4-7

Russell v. Eaves,
722 F. Supp. 558 (E.D. Mo. 1989) 8

Ryan v. State of Montana,
580 F.2d 988 (9th Cir. 1978) 3

State v. Gleason,
576 A.2d 1246 (Vt. 1990) 5-6

Taylor v. Best,
746 F.2d 220 (4th Cir. 1984) 3

United States v. Heldt,
668 F.2d 1238 (D.C. Cir. 1981) 6

MISCELLANEOUS

Patrick Carnes, *Out of the Shadows; Understanding Sexual Addiction*
(Comp Care Pub., Mpls., MN, 1983) 8

United States Constitution
Amendment V . . . . . Passim

United States Supreme Court Rules
Rule 37 1

INTERESTS OF *AMICI CURIAE* STATES

The State of Idaho, and the 19 other *amici* states and commonwealths, through their respective Attorneys General, appear on behalf of their citizens and file this brief pursuant to Rule 37 of the rules of this Court. The *amici curiae* administer criminal justice systems within their jurisdictions to promote the safety and welfare of their citizens. The holding of the Supreme Court of Montana construes the right against self-incrimination stated in the Fifth Amendment of the United States Constitution, which applies to all states. The holding fails to preserve the integrity of the decisions of this Court, and threatens to establish an ill-founded trend against appropriate sentencing for sex offenders.

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SUMMARY OF ARGUMENT

The Montana Supreme Court's holding that a probationary condition which requires sexual offender treatment necessarily compels a sex offender to make statements in violation of the Fifth Amendment is contrary to the well-established decisions of this Court. The Fifth Amendment protection against self-incrimination is not available to an offender with respect to statements about the crime of which he was convicted when the statements are not compelled testimony, but are made to a therapist or counsellor for treatment purposes only. The statements, which constitute evidence of the offender's willingness to take responsibility for the crimes of which he was convicted, would not incriminate the offender in future criminal proceedings.

Further, a probation revocation proceeding is not a criminal proceeding during which the probationer's Fifth

Amendment rights may be asserted with respect to statements or silence in response to questions required as a probationary condition. An offender's refusal to discuss the acts for which he was convicted and the resulting failure to successfully complete treatment are therefore properly considered by the sentencing court as a basis for revocation of a suspended sentence.

The probationary condition imposed in this case was an appropriate and important attempt to treat or rehabilitate a convicted sex offender. The Montana Supreme Court's erroneous analysis and conclusions conflict with precedents of this Court and threaten the availability of any sentence requiring similar treatment.

REASONS FOR GRANTING THE WRIT

I. The Montana Supreme Court Erroneously Applied Fifth Amendment Protections to a Treatment Situation.

Donald Imlay was convicted by a jury of sexual assault of a 7-year-old girl and given a five-year suspended sentence on the condition that he complete sex offender treatment. He came back before the state district court on a petition to revoke his suspended sentence after he failed to fulfill the condition requiring completion of a sex offender treatment program. During his initial meetings with a therapist, Imlay had maintained that he did not commit the acts for which he was convicted by a jury. Because of his denial, Imlay was eventually denied further participation in treatment. At the probation revocation hearing, Imlay continued to maintain his innocence.

On appeal, the Montana Supreme Court concluded that Imlay was penalized because of his refusal to "confess" to the crime and that the Fifth Amendment protects against such procedures by the state. The state court failed to recognize the context in which Imlay was required to discuss the acts of which he had been convicted and rendered an opinion that is in conflict with decisions of this Court and others on at least three rules of law.

First, Imlay's silence occurred in a setting designed to provide treatment and rehabilitation. The therapy required as part of the sentence is not part of the adversary system and its purpose is not to extract incriminating statements from sex offenders. Where the purpose of a proceeding is to provide treatment, not punishment, the Fifth Amendment right against self-incrimination does not arise. *Allen v. Illinois*, 478 U.S. 364 (1986); *Taylor v. Best*, 746 F.2d 220 (4th Cir. 1984); *Ryan v. State of Montana*, 580 F.2d 988 (9th Cir. 1978); *but cf. Asherman v. Meachum*, 932 F.2d 137 (2d Cir. 1991), *reh'g en banc pending*.

Second, any discussion during treatment between Imlay and his therapist could not lead to Imlay's giving compelled testimony or answers. The Fifth Amendment protects statements made in a context where the declarant has been coerced or threatened with a penalty in the event he exercises the right to remain silent. In this case, Imlay was neither coerced nor faced with impermissible choices. He had already been convicted of the crime for which the treatment program required that he accept responsibility. His choices consisted of either discussing with a therapist the acts of which he was convicted and suffering no further criminal exposure, or maintaining his innocence and facing potential probation revocation. The choices are not of the type considered impermissible by

this Court. *See Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

As stated in *Minnesota v. Murphy*, 465 U.S. 420 (1984), the fact that a probationer's answers to questions may be the basis for revocation of probation does not lead to the conclusion that the answers were compelled and the process violative of the Fifth Amendment. The requirement that a probationer discuss matters that affect his probationary status does not give rise to a self-executing privilege against self-incrimination. The deciding factor is whether the discussion calls for answers that would incriminate the probationer in future criminal proceedings.

> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. ... [N]othing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by the finder of fact" in deciding whether other conditions of probation have been violated. *Lefkowitz v. Cunningham*, *supra*, 431 U.S., at 808, n.5, 97 S.Ct., at 2137, n.5. *See Baxter v. Palmigiano*, 425 U.S. 308, 317-18, 96 S.Ct. 1551, 1557-58, 47 L.Ed.2d 810 (1976).

Minnesota v. Murphy, 465 U.S. at 434 n.7.

Third, the discussion took place after Imlay's conviction and the discussion pertained only to the

criminal acts for which Imlay was convicted. Because the Fifth Amendment shields only statements that would incriminate a person in future criminal proceedings,[1] Imlay's discussion of the crimes of which he had already been convicted would not be considered violative of the Amendment's protections.[2]

As stated by the Vermont Supreme Court in *State v. Gleason*, 576 A.2d 1246 (Vt. 1990):

> [T]he imposition of sentence extinguishes the privilege against self-incrimination with respect to the crime of which the accused is convicted and, because of the protection against double jeopardy, defendant faces no threat of subsequent prosecution for the offense.

576 A.2d at 1250. Gleason asserted that a probationary condition imposed as a part of his suspended sentence was violative of his Fifth Amendment rights. The condition required that Gleason discuss his sexual behavior and the sexual offenses of which he had been convicted. Relying on this Court's decision in *Minnesota v. Murphy*, the Vermont court ruled that the condition did not infringe upon Gleason's rights and that his refusal to

---

[1]The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, *where the answers might incriminate him in future criminal proceedings*." [Emphasis in original.] *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

[2]Similarly, a grant of immunity would be useless as applied to statements regarding a prior conviction and would therefore not resolve the issue at hand.

discuss the criminal acts was a proper basis for revoking his suspended sentence.

> Special condition 21(a), however, required defendant to discuss matters relevant only to his probationary status and his prospective rehabilitation. The special condition did not take the extra, impermissible step of compelling defendant to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent. ... The only sexual offenses that 21(a) required defendant to explore were those for which he had been convicted.

576 A.2d at 1251 (footnote omitted). *See also McQueen v. Commonwealth*, 721 S.W.2d 694 (Ky. 1986), *cert. denied*, 481 U.S. 2203 (1987); *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981) (witness who has been found guilty of certain actions is no longer entitled to claim Fifth Amendment privilege with respect to those matters and may be compelled to testify about them). Here, as in *Gleason*, the Fifth Amendment does not apply to a discussion of acts that gave rise to the charge of which Imlay was convicted.

Thus, in this case Imlay could not assert a Fifth Amendment right to avoid discussing his participation in the crime for which he was convicted with a therapist as part of a probation requirement. Similarly, he could not assert the right at a probation revocation hearing to avoid discussing his failure to fulfill the conditions of his probation, i.e., his failure to complete the required sexual offender treatment. *Minnesota v. Murphy*, 465 U.S. at 434 n.7 (1984).

The Montana Supreme Court also mischaracterized the result or effect of Imlay's continued denial and

eventual probation revocation. Noting that Imlay was sent to prison upon revocation, the court stated that he was penalized for maintaining his innocence. In reality, however, Imlay was sent to prison upon his failure to fulfill the conditions which made him a candidate for supervised release. Revocation of probation, free from due process violations, is a valid exercise of a court's power to terminate a supervised community-based course of rehabilitation. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The threat of revocation of probation due to failure to fulfill conditions cannot be equated with the threat of economic sanctions upon valid assertion of Fifth Amendment rights. *Minnesota v. Murphy*, 465 U.S. 420 (1984). As stated above, there can be no valid assertion of Fifth Amendment rights in this case.

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II. Failure by a Court to Recognize the Legal Propriety and Therapeutic Necessity of Requiring Discussion of Criminal Acts During Treatment Jeopardizes Any and All Treatment Programs Which Require Acceptance of Responsibility by an Offender.

The condition imposed as a part of Imlay's suspended sentence that he obtain and complete sexual offender treatment was reasonably related to his crime of sexual assault. In an attempt to provide alternatives which would benefit society, as well as the defendant, the original sentencing court issued a sentence not unusual in courts attempting to deal with cases involving sexual offenses. It imposed a prison sentence, but suspended the sentence on conditions, including the most pertinent condition of completion of a sex offender treatment program.

During Imlay's sexual offender treatment, the therapist eventually required discussion of the sexual acts of which

Imlay had been convicted. Such discussion is considered evidence of an acceptance of responsibility for the acts and is widely accepted in the sexual offender therapy professions as a prerequisite to treatment of a condition or personality trait which often leads to criminal sexual behavior. Patrick Carnes, *Out of the Shadows; Understanding Sexual Addiction* (Comp Care Pub., Mpls., MN, 1983).

Given the Montana Supreme Court's conclusion that a treatment program which requires discussion of the sexual acts that are the basis for the conviction is violative of the offender's rights, even inpatient treatment which requires such discussion is precluded. As a result, both the state and sex offenders suffer the loss of the availability of meaningful treatment programs which deal with the causes and effects of criminal sexual behavior. Such an effect is completely contrary to the goals of rehabilitation.

In *Russell v. Eaves*, 722 F. Supp. 558 (E.D. Mo. 1989), a prisoner in Missouri challenged the use of a sex offender treatment program which required discussion of the participants' crimes and completion of the program prior to parole eligibility. In finding no violation of the prisoner's Fifth Amendment rights, the federal district court stated:

> The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Court has also held that the fifth amendment protects against compelled testimony in <u>any</u> proceeding "where the answers might incriminate [the witness] in future criminal proceedings." *Allen [v. Illinois]*, 478 U.S. at 368, 106 S.Ct. at 2991. Plaintiff's situation does not jeopardize any

> of the above guarantees. First, MOSOP [Missouri Sexual Offender Program] is not a criminal proceeding, but a clinical rehabilitative program. Second, plaintiff's "testimony" is not compelled. He can refuse to participate in MOSOP. Finally, plaintiff has already been convicted of the crime for which MOSOP requires he accept responsibility. [Emphasis in original.]

722 F. Supp at 560.

It is arguable that the rationale relied upon by the Montana Supreme Court could be used to attack programs that require offenders to discuss substance abuse involved in the commission of crimes, even though it is a well-known and accepted principle of substance abuse treatment that denial must be dealt with before treatment can be continued. In that way, the *Imlay* decision could jeopardize court-ordered drug and alcohol abuse programs.

The ramifications of the Montana Supreme Court's decision in this case are devastating and widespread. Without a well-reasoned holding consistent with this Court's Fifth Amendment decisions, the efficacy of sex offender treatment programs and other similar treatment programs is tenuous. The Court should take this opportunity to make clear that such programs are not violative of a person's rights and should be continued as valid rehabilitative tools.

CONCLUSION

The *amici curiae* states and commonwealths respectfully request this Court to grant the State of

Montana's petition for writ of certiorari. The decision of the Montana Supreme Court is in direct conflict with the holdings of this Court and others regarding the application of the Fifth Amendment.

Respectfully submitted,

Larry EchoHawk
Attorney General
of the State of Idaho
* John J. McMahon
Chief Deputy Attorney General
Statehouse, Room 210
Boise ID 83720
Telephone: (208) 334-2400

* *Counsel of Record*

November 1991

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(6)

No. 91-687

In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026
Counsel for Petitioner

BILLY MILLER*
Suite 300
600 Central Plaza
Great Falls MT 59401
(406) 727-5990
Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed October 21, 1991
Certiorari Granted March 2, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4/4

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Notice of Location of Lower Court Opinions and Orders Not Reprinted in the Joint Appendix..... 3

Affidavit and Motion for Leave to File Information... 4

Information 10

Motion to Amend Information..... 13

Amended Information 15

Original Judgment of Conviction and Sentencing Order..... 18

State's Petition for Revocation of Suspended Sentence 24

Report of Probation Violation..... 26

Letter from Michael Sullivan dated May 22, 1990..... 30

Order Revoking Suspended Sentence and Sentencing Order..... 32

Judgment of Conviction and Resentencing Order (on remand from Montana Supreme Court)..... 38

RELEVANT DOCKET ENTRIES FOR MONTANA v. IMLAY:

Date	No.	Proceeding
5/10/89	01	MOTION FOR LEAVE TO FILE INFORMATION
5/10/89	02	INFORMATION
9/05/89	35	MOTION TO AMEND INFORMATION and ORDER
9/05/89	36	AMENDED INFORMATION
10/12/89	57	PRESENTENCE INVESTIGATION REPORT
10/19/89	59	PSYCHOLOGICAL EVALUATION OF DEFENDANT
10/19/89	61	JUDGMENT OF CONVICTION AND SENTENCING ORDER Defendant sentenced to five years in Montana State Prison suspended on primary condition that defendant complete sex offender therapy.
6/05/90	70	REPORT OF PROBATION VIOLATION FILED BY IMLAY'S PROBATION OFFICER
6/11/90	71	PETITION FOR REVOCATION OF SUSPENDED SENTENCE Exhibit A attached to Petition includes letter from Imlay's therapist, Michael Sullivan, indicating Imlay as unacceptable for treatment because of his failure to accept responsibility for the acts of which he was convicted.

9/04/90	79	ORDER REVOKING SUSPENDED SENTENCE AND SENTENCING ORDER Probation revoked and defendant sentenced to five years in Montana State Prison. District court recommends that defendant not be eligible for parole until completion of sex offender treatment program at prison.
7/25/90	92	TRANSCRIPT OF PROBATION REVOCATION HEARING
8/06/91	96	JUDGMENT OF CONVICTION AND RESENTENCING ORDER On remand from Montana Supreme court, defendant sentenced to five years in Montana State Prison with credit for time served.

NOTICE OF LOCATION OF LOWER COURT OPINIONS AND ORDERS NOT REPRINTED IN THE JOINT APPENDIX

The following opinion and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the Montana Supreme Court dated June 18, 1991 ..... 1a

Order by the Montana Supreme Court denying the petition for rehearing dated July 23, 1991 ..... 26a

Tammy K. Plubell
Deputy County Attorney
Cascade County Courthouse
Great Falls, MT 59401
Telephone: (406) 761-6700
Attorney for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

THE STATE OF MONTANA, Plaintiff, -vs- DONALD GLENN IMLAY, Defendant.	No. CDC-89-109 AFFIDAVIT AND MOTION FOR LEAVE TO FILE INFORMATION DIRECT (Filed May 10, 1989)

The undersigned Deputy County Attorney of Cascade County, Montana, being first duly sworn upon her oath, moves the Court for Leave to File Information charging the above-named Defendant with the crimes of COUNTS I, II and III: SEXUAL ASSAULT, FELONIES, as specified in MCA section 45-5-502 (1987), committed at Parkdale Grocery and attached house, Great Falls, Cascade County, State of Montana, on or about April 11, 1989, and for said Motion deposes and says:

The Court is informed that on April 11, 1989, at approximately 3:40 p.m., Great Falls Police Officers Perkins and Hickman were dispatched to the residence of Jane Doe and her mother. The officers interviewed Jane

Doe's mother who reported that when her daughter came home from school that afternoon she informed her mother that the owner of Parkdale Grocery had "played with her privates" while she was at the store. Jane Doe reported this incident to her teacher at Longfellow School, Mrs. Stubbs. Jane Doe's mother further reported that Jane Doe stayed with a friend on April 10, 1989. On April 11, 1989, at approximately 9:30 a.m., Jane Doe's mother picked up Jane Doe and took her home. Jane Doe changed her clothes, ate breakfast and left for school at approximately 10:30 a.m.

Officer Perkins and Officer Hickman then interviewed Jane Doe. Jane Doe reported after she left for school she immediately walked to Parkdale Grocery Store. She went inside the store and asked the man working behind the counter if her classmates had returned from a field trip. The man reported they had not. Jane Doe described the man as being older and having gray hair. She did not know his name but knew he was the owner of the store. Jane Doe reported the man then walked up to her, took her by the hand, and led her to the office which is next to the main portion of the store. The man sat in a chair and placed Jane Doe on his knee. The man then unbuttoned and unzipped her pants and began fondling her vaginal area. Jane Doe reported the man rubbed his hand and fingers over her "privates" for several minutes. The man then went back into the main part of the store at which time Jane Doe hid behind what she referred to as a safe in the office.

Jane Doe reported the man returned moments later and found Jane Doe hiding. Jane Doe's pants were still unzipped and the man once again fondled her privates

for several minutes. The man stopped and again went into the main portion of the store. Jane Doe reported she was frightened and felt very uncomfortable. Consequently, Jane Doe went to the basement in an effort to hide. She hid beneath a long wooden work bench with tools on it. She also zipped and buttoned her pants. Jane Doe thought she heard someone come into the basement.

After the person left the basement, she waited a few minutes and went back upstairs. The man again met her at the office. He took her by the hand and led her into the livingroom of his home which adjoins the store and office. The man sat in a chair and again placed Jane Doe on his lap. He again unbuttoned and unzipped Jane Doe's pants and rubbed her "privates" as he had done previously. Jane Doe reported the man was "digging" into her and also felt her "boobs". While the man was rubbing her vaginal area he asked, "Do you like it?" Jane Doe responded "No" and the man finally stopped. He refastened Jane Doe's pants and led her to the store. He then gave her a Tootsie Pop sucker and told her not to tell anyone.

Jane Doe reported she exited the store, walked to the alley behind the store and hid the sucker because she did not want the sucker under the circumstances. She later went to school and eventually reported these incidents to her teacher, Mrs. Stubbs. Jane Doe took the officers to the alley where she hid the sucker. She described the sucker as having a purplish-pink wrapper. Officer Perkins located a raspberry flavored Tootsie Pop sucker lying on the ground next to the southwest corner of a shed behind 1416 6th Avenue South. Officer Perkins pointed out the sucker and Jane Doe identified it as the one given to her

by the man in the store. The officers recovered the sucker and placed it into evidence at the Great Falls Police Department.

After recovering the sucker, the officers transported Jane Doe and her mother to the Columbus Hospital where Jane Doe was examined by Dr. Ellis. Jane Doe related the same information to Dr. Ellis which she had reported to the police officers. Dr. Ellis examined Jane Doe and did find abrasions in the region of the clitoris and surfaces of the labia.

Officers Perkins, Hickman and Scheele went to the Parkdale Grocery Store to contact the suspect. The officers earlier determined that the owner of the store was Donald Imlay, the Defendant. The Defendant is 56 years old with graying hair. The Defendant admitted he was the person working in the store at 10:30 that morning and that no other person was working in the store at that time. After the officers informed him of Jane Doe's report against him, he admitted seeing a girl of Jane Doe's description in his store about 10:30 that morning. He stated she had walked into his office and he found her hiding behind his filing cabinet. He stated he was unsure why she was hiding but speculated she was trying to skip school. The Defendant indicated the little girl had also gone and hid in the basement. He said he went down to try and find her but was unable to locate her. The officers located a filing cabinet in the Defendant's office which they believed Jane Doe mistook for a safe. The officers located a long wooden work bench in the basement. There were tools on top of the bench. The officers also located a candy jar near the front counter of the store which contained Tootsie Pops. Consequently the officers

were able to verify information given to them by Jane Doe. The Defendant denied having sexual contact with Jane Doe.

The State of Montana will prove by testimony of the witnesses whose names are endorsed on the Information as well as the physical evidence recovered, that the Defendant, DONALD GLENN IMLAY, did commit the crimes of COUNTS I, II and III: SEXUAL ASSAULT, FELONIES, in violation of MCA section 45-5-502 (1987); that said Deputy County Attorney has investigated the facts surrounding the charges against said Defendant and believes there is probable cause to believe that the Defendant committed the offenses here charged; and all of which was done contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State of Montana.

DATED: May 9th, 1989.

/s/ Tammy K. Plubell
Deputy County Attorney
Cascade County, Montana

SUBSCRIBED AND SWORN TO BEFORE ME May 9th, 1989.

/s/ Joel G. Roth
DISTRICT COURT JUDGE

ORDER

Upon reading the foregoing Motion for Leave to File Information and it appearing that there is probable cause to believe the Defendant above-named committed the crimes charged;

IT IS HEREBY ORDERED that leave be granted to the above-named Deputy County Attorney to file the Information as asked for.

Defendant is to be admitted to bail in the sum of $5,000 - DOLLARS.

DATED: May 9th, 1989.

/s/ Joel G. Roth
DISTRICT COURT JUDGE

cc: County Attorney/Plubell
Defense Counsel - Billy Miller
CCSO

Tammy K. Plubell
Deputy County Attorney
Cascade County Courthouse
Great Falls, MT 59401
Telephone: (406) 761-6700
Attorney for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

THE STATE OF MONTANA, Plaintiff, -vs- DONALD GLENN IMLAY, Defendant.	No. CDC-89-109 INFORMATION JOEL G. ROTH (Filed May 10, 1989)

The undersigned Patrick L. Paul, County Attorney of Cascade County, Montana, states: that an Affidavit having been filed and Leave of Court having been granted for the filing of an Information and before the filing of this Information, the above-named Defendant, DONALD GLENN IMLAY, on or about the day April 11, 1989, at Parkdale Grocery and attached house, Great Falls, Cascade County, Montana, committed the offenses of COUNTS I, II and III: SEXUAL ASSAULT, FELONIES, as specified in MCA section 45-5-502 (1987).

The facts constituting the offenses are:

COUNT I: SEXUAL ASSAULT, A FELONY. On or about April 11, 1989, the above-named Defendant, age 56,

knowingly subjected Jane Doe, age 7 and not his spouse, to sexual contact without consent by using his hand to fondle Jane Doe's vaginal area at the location of the office area of Parkdale Grocery Store;

COUNT II: SEXUAL ASSAULT, A FELONY. On or about April 11, 1989, the above-named Defendant, age 56, knowingly subjected Jane Doe, age 7 and not his spouse, to sexual contact without consent by again using his hand to fondle Jane Doe's vaginal area at the location of the office area of Parkdale Grocery Store. Count II happened at a separate time from Count I.

COUNT III: SEXUAL ASSAULT, A FELONY. On or about April 11, 1989, the above-named Defendant, age 56, knowingly subjected Jane Doe, age 7 and not his spouse, to sexual contact without consent by using his hand to fondle Jane Doe's vaginal area at the location of the Defendant's livingroom, which is attached to the Parkdale Grocery Store. Count III happened at a separate time from Counts I and II; all of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State of Montana.

DATED this 9th day of May, 1989.

/s/ Tammy K. Plubell
COUNTY ATTORNEY
Cascade County, Montana

STATE OF MONTANA)
: ss.
County of Cascade)

The undersigned, being first duly sworn on his oath, deposes and says: That he is the duly appointed, qualified and acting County Attorney of Cascade County, State of Montana; that he has read the foregoing Information, knows the contents thereof and the matters, facts and things therein stated are true of his own knowledge, except those things stated on information and belief and that as to those he believes it to be true.

DATED this 9th day of May, 1989.

/s/ Tammy K. Plubell
COUNTY ATTORNEY

WITNESSES ON PART OF STATE:
Dan Loomis - GFPD
Bob Dykeman - GFPD
Dr. W. B. Ellis, Columbus Hospital, Great Falls, MT
Jane Doe
Jane Doe's Mother
Berkey A. Hamrell - 2226 Central Avenue West, #31, Great Falls, MT
Michelle M. Stubbs - Longfellow School, Great Falls, MT
Chris Hickman - GFPD
Donald Scheele - GFPD
Keith Perkins - GFPS

cc: County Attorney/Plubell
Defense Counsel - Billy Miller
Defendant - c/o Counsel
CCSO

J. Kim Schulke
Deputy County Attorney
Cascade County Courthouse
Great Falls, MT 59401
Telephone: (406) 761-6700
Attorney for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

THE STATE OF MONTANA, Plaintiff, -vs- DONALD GLENN IMLAY, Defendant.	)	No. CDC-89-109 MOTION TO AMEND INFORMATION (Filed Sept. 5, 1989)

COMES NOW J. KIM SCHULKE, Deputy County Attorney in and for the County of Cascade, and pursuant to Section 46-11-403, MCA (1987), moves this Court for its order amending the Information filed in the above-entitled cause as follows: That Counts I, II and III: Sexual Assault, Felonies, in violation of MCA section 45-5-502 (1987), be amended to Sexual Assault, a Felony, in violation of MCA section 45-5-502 (1987), on the grounds and for the reason that it is in the interests of justice. The affidavit filed in support of the original Information also supports this Amended Information.

DATED this 5th day of September, 1989.

PATRICK L. PAUL,
COUNTY ATTORNEY

By: /s/ J. Kim Schulke
J. Kim Schulke, Deputy

ORDER

Good cause appearing;

IT IS HEREBY ORDERED that the Information filed in the above-entitled cause is amended as follows: That Counts I, II and III: Sexual Assault, Felonies, in violation of MCA section 45-5-502 (1987), be amended to Sexual Assault, a Felony, in violation of MCA section 45-5-502 (1987).

DATED this 5th day of September, 1989.

/s/ Joel G. Roth
DISTRICT COURT JUDGE

cc: Deputy Attorney/Schulke
Billy Miller, Attorney for Defendant
CCSO
GFPD

J. Kim Schulke
Deputy County Attorney
Cascade County Courthouse
Great Falls, MT 59401
Telephone: (406) 761-6700
Attorney for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

THE STATE OF MONTANA, Plaintiff, -vs- DONALD GLENN IMLAY, Defendant.	No. CDC-89-109 AMENDED INFORMATION (Filed Sept. 5, 1989)

The undersigned Patrick L. Paul, County Attorney of Cascade County, Montana, states: that an Affidavit having been filed and Leave of Court having been granted for the filing of an Amended Information and before the filing of this Information, the above-named Defendant, DONALD GLENN IMLAY, on or about the day April 11, 1989, at Great Falls, Cascade County, Montana, committed the offense of SEXUAL ASSAULT, A FELONY, as specified in Section 45-5-502, MCA (1987).

The facts constituting the offense are: That the above-named defendant, age 56, knowingly subjected Jane Doe, age 7 and not his spouse, to sexual contact without consent by suing his hand to fondle Jane Doe's vaginal area and/or breasts at the location of (1) the counter area of

the Parkdale Grocery Store and/or (2) the office area of the Parkdale Grocery Store and/or (3) Defendant's living room which is attached to the Parkdale Grocery Store; all of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State of Montana.

DATED: September 5, 1989.

/s/ J. Kim Schulke
Dep. COUNTY ATTORNEY
Cascade County, Montana

STATE OF MONTANA)
: ss.
County of Cascade)

The undersigned, being first duly sworn on his oath, deposes and says: That he is the duly appointed, qualified and acting County Attorney of Cascade County, State of Montana; that he has read the foregoing Amended Information, knows the contents thereof and the matters, facts and things therein stated are true of his own knowledge, except those things stated on information and belief and that as to those he believes it to be true.

DATED this 5th day of September, 1989.

/s/ J. Kim Schulke
Dep. COUNTY ATTORNEY

WITNESSES ON PART OF STATE:
Det. Bob Dykeman - GFPD
Dr. W. B. Ellis - Columbus Hospital, Great Falls, MT
Jane Doe
Jane Doe's Mother

Berkey A. Hamrell – 2226 Central Ave. W., #31, Great Falls, MT
Michelle M. Stubbs – Longfellow School, Great Falls, MT
Officer Keith Perkins – GFPD
Dr. Janet Hossack – Strain Building, Great Falls, MT
Deputy Jim Olson – CCSO
Francine Parsons – 626B 18th St. So., Great Falls, MT

cc: County Attorney/Schulke
Defense Counsel/Billy Miller
Defendant – c/o Counsel
CCSO

MONTANA EIGHTH JUDICIAL DISTIRICT COURT,
CASCADE COUNTY

THE STATE OF MONTANA, Plaintiff, vs DONALD GLENN IMLAY, Defendant.	)	CAUSE NO. CDC-89-109 JUDGMENT OF CONVICTION AND SENTENCING ORDER (Filed Oct. 19, 1989)

On October 17, 1989, the above named defendant, DONALD GLENN IMLAY, personally appeared in Court for the purpose of being Sentenced herein. Other appearances were as follows: the defendant's attorney Billy Miller and Deputy Cascade County Attorney Kim Schulke. The defendant was found GUILTY after a Jury Trial of the offense of SEXUAL ASSAULT, A FELONY which involved a juvenile girl. At the time that the jury verdict was returned the Court revoked the defendant's bail and ordered that he be held in custody pending Sentencing. A Pre-Sentence Investigation was ordered and Sentencing scheduled for this time. The Court has received the Pre-Sentence Investigation which was prepared by the Adult Probation and Parole Bureau of Great Falls, and furnished a copy thereof to both counsel prior to Sentencing. The Court notes that 36 letters have been presented to the Court in connection with this Sentencing hearing. Additionally a psychological evaluation report prepared by Charles E. Jones has been filed with the Court. The County attorney filed a letter from the Mental Health

Services Inc., together with standards for a Sex Offender Evaluation.

The County Attorney did not call any witnesses prior to Sentencing. The defendant's attorney called three witnesses to testify prior to sentencing.

Both the County Attorney and the defendant's attorney made a Sentencing recommendation to the Court.

The defendant was given a opportunity to make any statement or comments he wished prior to sentencing and he did make a statement to the court expressing sorrow for the criminal offense for which he was found guilty.

There was no legal reason shown why Sentencing should not be pronounced at this time.

The Court has considered the following matters in Sentencing this defendant.

The defendant was found guilty after a jury trial of sexually assaulting a juvenile girl at the Parkdale Grocery in Great Falls, Montana on April 11, 1989. The defendant has been incarcerated in the Cascade County jail for a period of 35 days. The defendant is 56 years of age and is a widower who has raised four children who are now adults. The defendant is presently unemployed but does have an extensive history of full time employment. The defendant has no military history. The Pre-Sentence report recommends that restitution be paid for any psychological or psychiatric expenses incurred by the victim, plus repayment to the Crime Victims Program for payments that have been made on behalf of the victim.

The defendant does not have a prior criminal record of either misdemeanors or felonies.

The defendant's wife of 36 years died of cancer in 1986. The defendant completed High School and has completed numerous vocational courses by correspondence.

The defendant's past employment history is noteworthy; he has worked on farms and ranches; he has worked at a lumber yard and and [sic] sawmill; he has worked for the Great Northern and Northern Pacific Railroads; he has worked 19-1/2 years for the Anaconda Mining Company in Great Falls; he has worked for Moat Industries; and he is a member in good standing with the Electricians Local Union; and is owner and operator of Parkdale Grocery in Great Falls for a number of years.

Mr. Imlay was evaluated by Charles E. Jones on September 29, 1989. Dr. Jones administered a psychodiagnostic evaluation and administered various tests. The report indicates that the defendant has no previous psychiatric treatment or consultation and there is no evidence of prior behavioral treatment. The defendant is not an alcoholic and does not use dangerous drugs. Dr. Jones placed the defendant in the middle 50% of the population in IQ achievement. The defendant was diagnosed by Dr. Jones as having Post Traumatic Stress Snydrome [sic]. The report indicates that there is no latent or bizarre psychotic episodes and there are no sexual connotations in his test results. The defendant is presently experiencing a regressive and mentally depressive state of mind and a sense of no where to turn. In view of the defendant's disturbed depressive condition, Dr. Jones does not recommend any further incarceration. The recommendation of Dr. Jones is a mental health therapeutic program of psychiatric work and counseling.

The recommendations for Sentencing in this case range from a recommendation from the County Attorney and the victim's mother to 20 years in the Montana State Prison to the defendant's attorney's recommendation of a five year Suspended Sentence. The Court has observed the defendant in the various proceedings in the courtroom and is cognizant of the many letters that have been received by friends of the defendant which are all very supportive of the defendant. The defendant has no prior criminal history and does not abuse alcohol or use dangerous drugs. The Court accepts the representations of the defendant's attorney that this defendant is not a dangerous person and that the present offense was an isolated incident which will not be repeated in the future. The Court concludes that a period of incarceration in the Montana State Prison is not appropriate in this case but rather a Suspended Sentence with supervised probation and expressed conditions would be the appropriate Sentence. The Court also is cognizant of the age of the defendant (56) and the fact that this defendant is presently suffering from some medical problems.

THEREFORE, IT IS HEREBY ORDERED that the defendant, DONALD GLENN IMLAY, is Sentenced to serve FIVE (5) years in the Montana State Prison. However, the execution of said Sentence is hereby Suspended except for the first 35 days thereof. The defendant is ordered to serve 35 days in the Cascade County jail but is given credit for the 35 days he has previously been incarcerated. During the Suspended portion of the Sentence the defendant shall be on formal supervised [probation] with the adult Probation and Parole Bureau of Great Falls and subject to their rules and regulations. In addition

thereto the defendant shall be under the following conditions during the Suspended Sentence:

1. The defendant is to immediately enroll in a sexual therapy program at his own expense and continue said program until his therapist deems further counseling and therapy unnecessary. The Court would recommend that the defendant obtain his therapy at the Sexual Offender Treatment Program located in Helena, Montana.

2. The defendant is required to pay for all psychological and psychiatric counseling costs incurred by the victim in this case. Additionally, the defendant is required to pay restitution for any monies spent by the Montana Crime[ ] Victims Program which were incurred by the victim. The amount of said resitution [sic] shall be determined by the defendant's probation officer and a repayment program established so that the defendant may pay the restitution in installments. All payments are to be made to the Clerk of District Court, Cascade County Courthouse, Great Falls, Montana.

3. The defendant is prohibited from being alone with any minor female child unless there is another adult present at all times.

IT IS FINALLY ORDERED that pursuant to Section 46-18-236 MCA, the mandatory statutory surcharge of $20.00 is hereby assessed against this defendant. Said amount is to be paid to the Clerk of District Court, Cascade County Courthouse, Great Falls, Montana, as soon as possible.

DATED this 18th day of October, 1989.

/s/ Joel G. Roth
DISTRICT JUDGE

cc: County Attorney/Schulke
Billy Miller
Defendant
Adult Probation & Parole
Cascade County Sherriff

J. Kim Schulke
Deputy County Attorney
Cascade County Courthouse
Great Falls, MT 59401
Telephone: (406) 761-6700
Attorney for Plaintiff

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

THE STATE OF MONTANA Plaintiff, -vs- DONALD GLENN IMLAY, Defendant.	No. CDC-89-109 PETITION FOR REVOCATION OF SUSPENDED SENTENCE (Filed June 11, 1990)

J. Kim Schulke, Deputy County Attorney in and for the County of Cascade, State of Montana, alleges:

That on the 13th day of September, 1989, the Defendant, was found guilty by jury trial of the crime of Sexual Assault, a Felony, and on the 17th day of October, 1989, execution of sentence was suspended for five (5) years; that the said Defendant has violated the terms of his probation as contained in the Report of Violation, attached hereto as Exhibit "A" and by this reference made a part hereof.

WHEREFORE, petitioner prays the Court order:

1. That a copy of this petition be served upon the Defendant;

2. That a Warrant of Arrest be issued for the apprehension of Defendant;

3. That, upon arrest of the Defendant, a date and time be scheduled for Defendant to appear before this Court to answer the allegations of the Petition;

4. That the suspension be revoked and sentence be executed.

DATED this 8 day of June, 1990.

PATRICK L. PAUL,
COUNTY ATTORNEY
By: /s/ J. Kim Schulke
J. Kim Schulke

cc: County Attorney/Schulke
Attorney for Defendant/Billy Miller
Defendant
Adult Probation and Parole – Barbara Nihill,
P.O. Box 1884,
CCSO Billings, MT 59103

STATE OF MONTANA
DEPARTMENT OF INSTITUTIONS
CORRECTIONS DIVISION

Report to: Honorable Joel Roth
8th Judicial District

Name: IMLAY, Donald

Crime: Sexual Assault (F)

Date of Sentence: 10/18/89

Present Location: PO Box 373, Absarokee, MT

Date: 6/1/90

Number: CDC 89-109

Sentence: 5 years suspended

Termination Date: 10/18/94

Status: Mt Probation

Type of Report: REPORT OF VIOLATION Exhibit A
(Filed June 5, 1990)

On 10/18/89 Donald J. Imlay was sentenced by Eighth Judicial District Court Judge Joel Roth to five (5) years at Montana State Prison for the crime of Sexual Assault (felony). All but 35 days of the sentence was suspended.

On the same date, Mr. Imlay was signed to probation by Probation/Parole [Officer] Jacqueline Lageson-Belluschi. On 10/30/89 he was transferred to the supervision of Probation/Parole Officer Barbara Nihill. He continues to be supervised by that officer at the present time.

Since the defendant was signed to supervision, the following violations have occurred.

VIOLATIONS

State Rule #4 EMPLOYMENT AND/OR PROGRAM: You shall seek and maintain employment, or maintain a program approved by the Board of Pardons or Probation and Parole Bureau and shall not change such employment or program without first obtaining permission from your supervising officer.

Mr. Imlay has not been employed or in a structured program of any kind since he was signed to probation on 10/18/89. He claims to be unable to work because of arthritis, and has made application for services/benefits through S.R.S. According to S.R.S. Counselor Tony Martinez, Mr. Imlay has been accepted for rehabilitation services. Mr. Imlay wants to be self-employed as a leather worker, and Mr. Martinez reports that S.R.S. funding will be provided to help purchase needed equipment. Mr. Imlay may also be receiving financial disability benefits from Social Security and is waiting for a decision on this.

The essential fact in this situation is that Mr. Imlay is unemployed and so has no structured time schedule with which to order his days. All of his time is "free" time, an undesirable condition for a sex offender. It is questionable whether self-employment as a leather craft worker would significantly alter Mr. Imlay's over-supply of unstructured time.

Court Rule #1: The defendant is to immediately enroll in a sexual therapy program at his own expense and continue

said program until his therapist deems further counseling and therapy unnecessary. The Court would recommend that the defendant obtain his therapy at the Sexual Offender Treatment Program located in Helena, Montana.

State Rule #14 SPECIAL CONDITIONS: Sex offender treatment.

Mr. Imlay contacted South Central Treatment Associates for his sex offender evaluation and treatment. However, Evaluator Mike Sullivan found the defendant's level of denial to be so great that attempts to enter him into a treatment program would be both unethical and non-productive. A copy of Mr. Sullivan's letter concerning this issue is attached.

SUMMARY OF ADJUSTMENT TO SUPERVISION

Mr. Imlay presents unique problems in supervision in that he claims to be physically unable to work and so has been unable to comply with the employment requirement, and also that he continues to deny commission of the crime of which he was found guilty, rendering himself as unable to comply with the sex offender treatment mandate.

It is the opinion of this officer that, as an untreated sex offender, Mr. Imlay represents a danger to the community. This is exacerbated by the fact that he is unemployed and so has an excessive amount of unstructured time at his disposal, and also by the fact that he resides in a remote, outlying community where he cannot be closely monitored.

These factors – the defendant's unemployment, unsuitability for mandated sex offender treatment, and relative inaccessibility for supervision – place him at significant risk for re-offending.

RECOMMENDATION

It is recommended that Mr. Imlay be returned to Court for revocation proceedings.

Respectfully submitted,

/s/ Barbara Nihill
Barbara Nihill, State
Probation/Parole Officer III
Billings, MT

SOUTH CENTRAL TREATMENT ASSOCIATES

2139 Broadwater Avenue/Suite H
Billings, Montana 59102
406 652-4546

Maxine Jacobson, M.S.W., A.C.S.W.
Licensed Clinical Social Worker

Michael D. Sullivan, M.S.W.
Licensed Clinical Social Worker

May 22, 1990

Barbara Nihill
Adult Probation/Parole
P.O. Box 1884
Billings, MT 59103

re: Donald Imlay

Dear Ms. Nihill:

As we have discussed, the following is a summary of my contacts with Mr. Donald Imlay (DOB: 12/5/32). Mr. Imlay has been seen in this office on six separate occasions for a total of approximately six hours. In addition, he has been administered a polygraph examination and some psychological testing. I have also reviewed the police statement in this matter.

As you are aware, a sexual offender treatment program focuses very heavily on the individual client's responsibility for their sexually assaultive behavior. From the outset of my contacts with Mr. Imlay he has maintained a denial of the charges of sexual of [sic] assault for which

he has been convicted. Efforts were made by this examiner to try to break through this denial. These efforts, however, have been unsuccessful. As a result, Mr. Imlay is not viewed as an acceptable candidate for outpatient sexual offender treatment. He does not admit a problem in this area nor does he admit having ever committed a sexual offense. It would not be ethical or appropriate to continue to see him beyond this point. A sexual offender treatment program cannot serve the function of an enabler to insulate an individual from their personal responsibility. Until Mr. Imlay reaches a point in which he can assume responsibility for the acts for which he has been convicted, he would not be viewed as treatable in an outpatient sexual offender treatment setting.

If you have any questions or concerns please feel free to contact me.

Sincerely,

/s/ MD Sullivan
Michael D. Sullivan, M.S.W.
Licensed Social Worker

MDS:jh

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNT

THE STATE OF MONTANA, Plaintiff, vs DONALD GLENN IMLAY, Defendant.	CAUSE NO. CDC-89-109 ORDER REVOKING SUSPENDED SENTENCE AND SENTENCING ORDER (Filed Sept. 4, 1990)

On June 13, 1990, the State, through the Cascade County Attorney, filed herein a Petition to Revoke the Suspended Sentence of defendant, Donald Glenn Imlay.

On July 6, 1990, the defendant personally appeared in Court and answered NOT TRUE to the alleged violations set forth in the Petition to Revoke.

An evidentiary hearing was held on August 31, 1990, on said Petition to Revoke Suspended Sentence. Appearances at the hearing were as follows: the defendant, Donald Glenn Imlay; the defendant's attorney Billy Miller; and Deputy Cascade County attorneys Kim Schulke and Lisa Bazant.

The State called two witnesses who were sworn and testified: Barbara Nihill and Michael D. Sullivan. The defendant was sworn and testified.

Following the presentation of the testimony and the admission into evidence of the defendant's exhibit "A" (a schedule of the defendant's earnings from his leather work in August 1990), both Kim Schulke and Billy Miller

orally argued the Petition to Revoke and made sentencing recommendations.

The following shall constitute the Court's Findings of Fact and Conclusions of Law and Order herein.

The defendant was found guilty of Sexual Assault, a Felony, involving a minor female girl after a jury trial herein which concluded on September 13, 1989.

The defendant was sentenced on October 17, 1989 to FIVE (5) years in the Montana State Prison with the execution of all of said sentence suspended except the first 35 days. The defendant was ordered to serve 35 days in the Cascade County jail but given credit for 35 days he had been incarcerated. The defendant was placed on formal supervised probation with the Adult Probation and Parole Bureau of Great Falls, Montana. An additional condition (along with others which are not involved herein) imposed by the Court, was that the defendant was to immediately enroll in a sexual thereapy [sic] program at his own expense and continue said program until his therapist deems further counselling and therapy unnecessary.

The Petition to Revoke alleged two violations of conditions of the suspended sentence. The first related to the requirement that the defendant seek and maintain employment or maintain a program approved by the Adult Probation and Parole Bureau. The evidence presented with respect to said alleged violation established that the defendant had applied for employment as an electrician at the mines around Absorkee, Montana, where he resided with his mother. However, because of

the defendant's physical condition (he was under doctor's orders not to walk) he was denied employment. The defendant also applied for a job of custodian with the Absorkee school district, but was also denied employment there (for the same reason). The defendant began working with the Department of Social Rehabilitation Services and was accepted in a program of vocational-rehabilitation involving leather work. The department paid for a correspondence course in leather work and also furnished some tools to the defendant. The defendant began performing leather work under the program and sold $320.00 of leather goods in August 1990. The defendant had applied for disability benefits while on probation but said requested benefits were denied. The defendant's supervising probation officer, Barbara Nihill, testified that the defendant did not have steady employment and his working time was not supervised.

The Court concludes that the defendant was making a bona fide effort to obtain employment and was accepted into a vocational – rehabilitation program and was actively pursuing said program. The Court concludes that the State has failed to establish by a preponderance of the evidence that the defendant was in violation of State Rule #4 which required that the defendant seek and maintain employment.

The second alleged violation related to the condition that the defendant immediately enrol in a sexual offender thereapy [sic] program. State's witness, Michael D. Sullivan, a licensed social worker, testified with regard to that condition. The defendant was referred to Mr. Sullivan by his supervising probation officer, Barbara Nihill. Sullivan is a co-director of South Central T[r]eatment

Associates in Billings, Montana, which provides a therapy program on an out-patient basis for sex offenders. The defendant and Sullivan met six times between November 20, 1989 and March 23, 1990 for a total of approximately 5½ hours. The defendant was not accepted into the program in Billings because he (the defendant) continued to deny the sexual assault of which he had been found guilty. In fact, during the defendant's testimony at this evidentiary hearing, he denied the sexual assault. The sex offender thereapy [sic] program in Billings will not accept a person for therapy who denies commission of the sex offense.

The defendant also contacted Ron Silvers who is in charge of the Sexual Offender Treatment Program in Helena in order to apply for admission to that program. However, the evidence established that he was not accepted into that program either, apparently for the same reason as his non-acceptance into the Billings program. The testimony of Sullivan established that there are no out-patient sex offender treatment programs that will accept a person who denies having committed the sexual offense.

The only in-patient sex offender treatment program is located inside the prison at the Montana State Prison.

The Court concludes that the defendant has violated the condition of his suspended sentence by not enrolling (not being amenable to treatment and hence, not acceptable into an out-patient treatment program) in a sex offender treatment program and said violation was proven by a preponderance of the evidence.

After the filing of the Petition to Revoke Suspended Sentence, the Court received numberous [sic] letters from the defendant's family and friends, all supportive of the defendant. However, the Court must accept the guilty verdict of the jury. The defendant's continuing denial of guilt forecloses his acceptance into an out-patient sex offender treatment program. However, the most important condition on the defendant's suspended sentence was that one relating to his immediate enrolling in a sex offender treatment program. Because the only viable alternative is an in-patient treatment program, the Court concludes that the defendant's suspended sentence must be revoked and the defendant ordered to serve FIVE (5) years in the Montana State Prison with credit for 35 days.

THEREFORE, IT IS HEREBY ORDERED that the defendant's FIVE (5) year Suspended Sentence is revoked.

IT IS ALSO ORDERED that the defendant is sentenced to serve FIVE (5) years in the Montana State Prison with credit for 35 days already served.

It is recommended to the Warden of the Prison that the defendant not be eligible for parole until he has completed the sexual offender treatment program at the Prison. However, it is also recommended that upon completion of the program, the defendant be considered for parole. The defendant is designated as a non-dangerous offender for parole eligibility purposes.

IT IS FINALLY ORDERED that the defendant is remanded to the custody of the Cascade County Sheriff for transportation to the Montana State Prison.

DATED this 4th day of September, 1990.

/s/ Joel G. Roth
DISTRICT JUDGE

cc: County Attorney/Schulke
Billy Miller
Defendant
Cascade County Sheriff
Adult Probation and Parole Bureau
Warden/Montana State Prison
St Ind
GFPD

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

THE STATE OF MONTANA, Plaintiff, vs DONALD GLENN IMLAY, Defendant.	CAUSE NO. CDC-89-109 JUDGMENT OF CONVICTION AND RE-SENTENCING ORDER (Filed Aug. 6, 1991)

On August 2, 1991, the above named defendant, DONALD GLENN IMLAY, personally appeared in Court for the purpose of being re-sentenced herein. Other appearances were as follows: the defendant's attorney Billy Miller and Cascade County Attorney Patrick Paul and Deputy Cascade County Attorney Tammy Plubell.

The defendant was convicted of Sexual Assault, a Felony in the above case and was originally sentenced by a sentencing order dated October 18, 1989. Basically, the original sentence was a five year sentence in the Montana State Prison with the execution of the Sentence being Suspended except for the first 35 days. The defendant was ordered to serve 35 days in the Cascade County jail but was given credit for the 35 days he was previously incarcerated. The defendant was placed on supervised probation during the suspended sentence with several

conditions attached thereto. The condition on his suspended sentence, which gives rise to the problem in this case, was the condition which required the defendant to immediately enroll in a sexual treatment program and to complete the program.

A Petition to Revoke the Suspended Sentence was filed on or about June 8, 1990. The defendant answered Not True to the alleged violations in the petition to revoke his suspended sentence. An evidentiary hearing was held on the petition to revoke, and following said hearing the Court revoked the defendant's five year suspended sentence for the reason that the defendant had not enrolled in any sexual offender treatment program. The defendant was sentenced to serve five years in the Montana State Prison.

The defendant's sentence following the revocation hearing was appealed to the Montana State Supreme Court.

In Cause No. 90-493 decided June 18, 1991, the Montana Supreme Court vacated the sentence imposed herein and remanded the case to this Court for re-sentencing.

At the beginning of the hearing herein the county attorney argued that the defendant should be re-sentenced at this time as if this were the original sentencing hearing. The defendant's attorney argued that the sentence of this Court following the revocation proceeding should be the sentence to be considered at this time. After hearing arguments from both counsel the Court concludes that it is the original sentence herein which is to be considered and not the sentence imposed after the revocation proceeding.

Both the county attorney and the defendant's attorney made a sentencing recommendation to the Court.

The Court has considered the following matters in sentencing the defendant at this time. The defendant was found guilty after a jury trial of Sexual Assault, a Felony, involving a minor female child. The defendant has denied committing the offense from the beginning of the case. During testimony at trial the defendant denied committing the offense. The most important condition on the defendant's five year suspended sentence was the defendant immediately enroll in a sexual offender treatment program. The problem which has arisen in this case is that there is no sexual offender treatment program which will accept an individual unless that individual admits having committed a sexual offense. In the present case the defendant denies having committed the sexual offense. Therefore, the two sexual offender treatment programs which the defendant attempted to enroll in refused to accept him because he denied having committed the sexual offense. Based on the defendant's failure to enroll in a sexual offender treatment program, the County Attorney filed a Petition to Revoke his Suspended Sentence. The Court, as indicated above, after an evidentiary hearing did revoke the defendant's five year suspended sentence and ordered that he serve five years in the Montana State Prison for violating a condition on his suspended sentence.

The Montana Supreme Court, in its decision herein, ruled that a criminal defendant could not be compelled to admit to committing a criminal offense even though he had been found guilty of a criminal offense after a jury trial. Because the defendant's refusal to admit to having

committed the sexual assault meant that he was not eligible for any sexual offender treatment program, the defendant could not comply with the condition on his suspended sentence which required that he enroll in a sexual offender treatment program. The Montana Supreme Court therefore vacated the sentence and remanded the case to this court for re-sentencing.

The Court concludes that because the original sentence herein was premised on the condition that the defendant would enroll and complete a sexual offender treatment program, the Court concludes that since that option is no longer available to the Court that the defendant should be sentenced to a period of incarceration at the Montana State Prison. The offense for which the defendant was found guilty is a serious offense and involved a juvenile girl. The Court concludes that for the protection of society the defendant should be incarcerated.

Had the Court known at the time of the original sentence herein that this defendant would not be accepted in a sexual offender treatment program, the Court would not have imposed a suspended sentence but rather would have imposed a prison sentence.

THEREFORE, IT IS HEREBY ORDERED that, DONALD GLENN IMLAY, is sentenced to serve FIVE (5) years in the Montana State Prison at Deer Lodge, Montana. The defendant is given credit for the 35 days he was incarcerated prior to his original sentence herein and he is also given credit for the time he has been incarcerated in the Montana State Prison following the sentence imposed at the conclusion of the revocation proceeding.

For purposes of parole eligibility, the Court declares this defendant to be a non-dangerous offender.

IT IS FINALLY ORDERED that the defendant be remanded to the custody of the Cascade County Sheriff to be held in custody pending transportation to the Montana State Prison.

DATED this 5th day of August, 1991.

/s/ Joel G. Roth
DISTRICT JUDGE

cc: County Attorney/Paul & Plubell
Billy Miller
Defendant
Adult Probation & Parole Bureau
Cascade County Sheriff
Montana State Prison/Warden
ST ID
GFPD

Supreme Court, U.S.
FILED
APR 16 1992
OFFICE OF THE CLERK

(7)

No. 91-687

In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ Of Certiorari To The Montana Supreme Court

BRIEF FOR THE PETITIONER

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

46

QUESTION PRESENTED

Is a probationer's privilege against self-incrimination under the Fifth Amendment as applied to the states through the Fourteenth Amendment violated by a probation condition that requires completion of sex offender therapy, when successful completion of the therapy necessitates acceptance of responsibility for the crime of which the probationer was convicted?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

ARGUMENT 12

I. A PROBATIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED BY IMPOSITION OF A PROBATION CONDITION WHICH ULTIMATELY REQUIRES ACCEPTANCE OF RESPONSIBILITY OF THE CRIME FOR WHICH A PROBATIONER HAS BEEN CONVICTED .. 12

A. The Probation Condition Requiring Sex Offender Treatment Is Rationally Related to the Goals of Sentencing 13

B. Statements Sought for the Purpose of Treatment or Therapy Are Not Considered Incriminating Under the Fifth Amendment Privilege Against Self-incrimination 15

TABLE OF CONTENTS – Continued

Page

C. The Statements Sought From Imlay Concerning the Crime for Which He Had Been Convicted Do Not Pose a Realistic Threat of Future Criminal Prosecution 16

II. THE THREAT OF REVOCATION OF PROBATION FOR FAILURE TO ACCEPT RESPONSIBILITY OF THE CRIME OF WHICH A PROBATIONER HAS BEEN CONVICTED IS NOT A PENALTY THAT TRIGGERS FIFTH AMENDMENT PROTECTIONS..... 23

III. *THOMAS* AND SIMILAR CASES ARE NEITHER APPLICABLE NOR CONTROLLING.... 32

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Allen v. Illinois, 478 U.S. 364 (1986)..... 10, 15, 26

Asherman v. Meachum, 932 F.2d 137 (2d Cir. 1991) 31

Asherman v. Meachum, No. 90-2530 (2d Cir. Feb. 13, 1992) 31

Baxter v. Palmigiano, 425 U.S. 308 (1976)..... 27

Brown v. Walker, 161 U.S. 591 (1896)..... 17

Bryson v. United States, 396 U.S. 64 (1969)..... 22

Commonwealth v. Long, 583 A.2d 428 (Pa. Super. Ct. 1990) 20

Commonwealth v. Rodgers, 372 A.2d 771 (Pa. 1977)..... 19

Commonwealth v. Strickler, 393 A.2d 313 (Pa. 1978)..... 20

Estelle v. Smith, 451 U.S. 454 (1981)..... 18

Gagnon v. Scarpelli, 411 U.S. 778 (1973).....24, 25

Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985), *cert. denied*, 478 U.S. 1010 (1986) 19

Gardner v. Broderick, 392 U.S. 273 (1968) 10, 30

Garner v. United States, 424 U.S. 648 (1976)..... 10

Garrity v. State of New Jersey, 385 U.S. 493 (1967) ..8, 29

Gilfillen v. State, 582 N.E.2d 821 (Ind. 1991)..... 26

Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969)..... 14

Griffith v. Kentucky, 479 U.S. 314 (1987) 20

TABLE OF AUTHORITIES – Continued

Page

Harris v. New York, 401 U.S. 222 (1971) 22

In re Gault, 387 U.S. 1 (1967) 26

Lefkowitz v. Cunningham, 431 U.S. 801 (1977) ... 8, 27, 30

Lefkowitz v. Turley, 414 U.S. 70 (1973) 10, 24, 30

Malloy v. Hogan, 378 U.S. 1 (1964) 8

Marchetti v. United States, 390 U.S. 39 (1968) 17

McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1986) 19

Minnesota v. Murphy, 465 U.S. 420 (1984) 1, 24, 26, 28, 36

Morrisey v. Brewer, 408 U.S. 47 (1972) 29

Nix v. Whiteside, 475 U.S. 157 (1986) 22

People v. Prusak, 558 N.E.2d 696 (Ill. App. Ct. 1990) 26

Reina v. United States, 364 U.S. 507 (1960) ... 11, 17, 18

Roberts v. United States, 445 U.S. 552 (1980) 34

Rogers v. United States, 340 U.S. 367 (1951) 17

State v. Bennett, 666 P.2d 390 (Wash. Ct. App. 1983) 26

State v. Burow, 394 N.W.2d 665 (Neb. 1986) 24

State v. Donnelly, 798 P.2d 89 (Mont. 1990) 7

State v. Gleason, 576 A.2d 1246 (Vt. 1990) 17, 25

State v. Orseth, 359 N.W.2d 852 (N.D. 1984) 26

State v. Post, No. 57846-0 (Wash. S. Ct. Mar. 12, 1992) 17

TABLE OF AUTHORITIES – Continued

Page

State v. Rock, 380 N.W.2d 211 (Minn. Ct. App. 1986) 26

State v. Smith, 812 P.2d 470 (Utah Ct. App. 1991) 26

State v. Thiel, 768 P.2d 343 (Mont. 1989) 21

State v. Verdugo, 602 P.2d 472 (Ariz. 1979) 19

Taylor v. Best, 746 F.2d 220 (4th Cir. 1984), *cert. denied*, 474 U.S. 982 (1985) 16

Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) ..... *passim*

Ullmann v. United States, 350 U.S. 422 (1956) 11

Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280 (1968) 30, 31

United States v. Apfelbaum, 445 U.S. 115 (1980) 16, 22

United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975) 14

United States v. Frierson, 945 F.2d 650 (3d Cir. 1991), *cert. denied*, No. 91-6849 (Mar. 23, 1992) 36

United States v. Gonzalez, 897 F.2d 1018 (9th Cir. 1990) 23, 36

United States v. Gonzalez-Mares, 752 F.2d 1485 (9th Cir.), *cert. denied*, 473 U.S. 913 (1985) 18, 24

United States v. Grayson, 438 U.S. 41 (1978) 9, 33, 34

United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982) 19

United States v. Henry, 883 F.2d 1010 (11th Cir. 1989) 22, 23, 36

TABLE OF AUTHORITIES – Continued

Page

United States v. Mandujano, 425 U.S. 564 (1976)..... 22

United States v. Mourning, 914 F.2d 699 (5th Cir. 1990)..... 35

United States v. Oliveras, 905 F.2d 623 (2d Cir. 1990)..... 35

United States v. O'Neil, 936 F.2d 599 (1st Cir. 1991) 35

United States v. Rogers, 921 F.2d 975 (10th Cir.), *cert. denied*, 111 S. Ct. 113 (1990)..... 36

United States v. Rowland, 906 F.2d 621 (11th Cir. 1990)..... 23

United States v. Wong, 431 U.S. 174 (1977)..... 22

Williams v. New York, 337 U.S. 241 (1949) 9

Wilson v. State, 621 P.2d 1173 (Okla. Crim. App. 1980)..... 24

CONSTITUTIONAL PROVISIONS:

United States Constitution
Amendment V..... *passim*

Amendment XIV..... i

STATUTES:

Montana Code Annotated (1989)
§ 45-5-502 1

§ 45-5-502(3)..... 2, 9

§ 45-7-201 21

§ 46-18-201(a)(xii)..... 14

TABLE OF AUTHORITIES – Continued

Page

Montana Rules of Appellate Procedure
Rule 5(b) 18

United States Code
28 U.S.C. § 1257(3) 1

United States Sentencing Guidelines
§ 3E1.1 ..... 9, 14, 23, 36

OTHER:

McCormick on Evidence, § 121 (3d ed. 1984) 18

F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, *Criminal Justice Administration, Materials and Cases* (1969) 25

OPINION BELOW

The opinion of the Montana Supreme Court is reported at 813 P.2d 979 (1991). (Pet. App. 1a.)

JURISDICTION

The Montana Supreme Court's opinion was filed on June 18, 1991. (Pet. App. 1a.) The order denying the petition for rehearing was entered July 23, 1991. (Pet. App. 26a.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself[.]

2. Mont. Code Ann. § 45-5-502 (1989):

> **Sexual assault**. (1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.
>
> (2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.
>
> (3) If the victim is less than 16 years old and the offender is 3 or more years older than the

victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years and may be fined not more than $50,000.

(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if the victim is less than 14 years old and the offender is 3 or more years older than the victim.

STATEMENT OF THE CASE

On May 9, 1989, Donald Imlay was charged by information with sexual assault of a seven-year old girl. Mont. Code Ann. § 45-5-502(3) (1989). (Joint Appendix [J.A.] 10.) According to the affidavit in support of the information, on the afternoon of April 11, 1989, the little girl told her teacher and mother that the owner of the Parkdale Grocery store had "played with her privates" earlier that day. (J.A. 5.) The child victim's version of the assault was recounted in the affidavit in support of motion for leave to file information.[1]

On the morning of April 11, 1989, the victim was on her way to school and stopped by a local grocery store

[1] No transcript was ever made of the original trial because Imlay did not appeal his conviction; he only later appealed revocation of his probation.

where she talked with the man behind the counter who was later identified as Donald Imlay. She stated that the man took her by the hand, leading her into the store's office, where he placed her on his knee, unzipped her pants and fondled her vaginal area. After the man left, the little girl hid in the office. He returned moments later, found her hiding, and fondled her again for several minutes. When he left again, the frightened girl went to the basement to hide. She heard someone come down the stairs and waited in hiding until the person left. When she returned upstairs, she was again met by the man. She was led into the living room of his home adjoining the store and office. He sat on the chair, placed her on his lap, and again sexually assaulted her. When he finally stopped, he gave her a lollipop and told her not to tell anyone.

The victim reported the incident to her teacher and her mother, who called the police. The police took the girl to a hospital where the attending physician found abrasions in regions of the victim's clitoris and labia.

At the jury trial, the victim, the physician, the police officer, the victim's mother, her teacher, and a psychologist testified on the State's behalf. (Minute Entries dated September 11 and 12, 1989.) Donald Imlay, his son, and a private investigator testified on behalf of the defendant. (Minute Entry dated September 13, 1989.) Imlay denied any sexual contact with the girl. The defendant's version of the incident is related in the presentence report. (Presentence report, NR # 57.) Imlay stated that the victim had come into his store on the morning of April 11, 1989, but denied that he had fondled her. He described her as hiding in the various parts of the store, including the

office and basement, and being difficult to remove from the store. (Presentence Report at 3-4, NR # 57.)

Donald Imlay was found guilty of felony sexual assault. He was sentenced to five years in the Montana State Prison, with the prison term suspended on the primary condition that he "immediately enroll in a sexual therapy program at his own expense and continue said program until his therapist deems further counseling and therapy unnecessary." (J.A. 22.) He did not appeal the conviction or sentence.

While on probation, Imlay enrolled in a sexual therapy program and participated in the program for four months, meeting with his therapist a total of six times. (Tr. at 34, NR #92.)[2] Throughout therapy, Imlay denied that sexual contact had occurred between himself and the child. (Tr. at 35.) No progress was made in the therapy because of Imlay's continued denial. By March 6, 1990, during the fifth appointment with Michael Sullivan, Imlay's therapist, Imlay was told that he could not continue with outpatient treatment unless he accepted responsibility for the act of which he had been convicted. (Tr. at 41.) At the sixth and final meeting, both Sullivan and Imlay's probation officer, Barbara Nihill, met with Imlay and again informed him that he would have to admit the acts to remain in outpatient treatment. (Tr. at 43.) Sullivan explained to Imlay the problem of denial as a defense mechanism. Sullivan was frustrated because he

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[2] The reference is to the transcript of the probation revocation hearing held August 31, 1990, and September 4, 1990. The references are to Volume I of the transcript unless otherwise indicated.

could not successfully treat anyone who did not show any accountability or responsibility for his actions. (Tr. at 55.)

In Sullivan's opinion, Imlay was simply not acceptable for outpatient treatment. (Tr. at 56.) He believed that inpatient treatment might be better for Imlay because it could be provided on a daily basis, with more structure than outpatient therapy. *Id.* The only inpatient treatment center for sex offenders in Montana is located at the Montana State Prison. (Tr. at 59-60.)

Imlay's inability to make progress in the sexual offender treatment program caused great concern to his probation officer, Barbara Nihill. (Tr. at 10-11.) Her concern was grounded in the risk Imlay posed to the community. She stated, "If we have an offender who is clearly in denial, he is obviously in greater risk of reoffending than one who is recognizing and accepting responsibility for his problem." (Tr. at 11.) In her assessment, allowing Mr. Imlay to continue in outpatient therapy placed at risk the community where he lived. (Tr. at 11-12.)

Sullivan also expressed the view that community safety is the primary objective of the sex offender treatment programs and for that reason an outpatient program cannot continue to treat a person who fails to accept responsibility for his acts. (Tr. at 42.) Sullivan stated that it was, in fact, unethical for him to continue outpatient treatment of a person whom he believed was a threat to the safety of the community. *Id.* Sullivan felt that he could not assure appropriate community safety if the patient is in denial of a sexual offense. *Id.*

Based upon the above testimony, the district court revoked Imlay's suspended sentence and imposed a five-year sentence at the Montana State Prison, where inpatient sex offender treatment was available. (J.A. 35-36; Tr. at 67.) The court noted it had no alternative but to find a probation violation. (Tr. at 67-68.) The court further recommended in its order that Imlay be eligible for parole once he completed the sex offender program at the prison. (J.A. 36.)

Imlay appealed the district court's decision to the Montana Supreme Court, claiming that the condition requiring him to comply with sex offender treatment was unconstitutionally vague, that the condition violated his right to self-expression protected under the First Amendment to the United States Constitution, and that the condition was generally inequitable and unfair. Imlay did not raise on appeal the issue of whether the condition to complete sex offender treatment violated his privilege against self-incrimination. However, the Montana Supreme Court raised the issue *sua sponte*, concluding that the condition to complete the sex offender program violated Imlay's privilege against self-incrimination because it required his admission of guilt for the crime of which he had been convicted. (Pet. App. 8a-15a.) The Montana Court reasoned that the revocation of probation constituted a penalty for maintaining his innocence. The Court also suggested that Imlay would be subjecting himself to possible perjury charges and would be jeopardizing possible collateral relief in state postconviction or federal habeas proceedings if he admitted to the acts for which he was convicted. The Court reversed the district

court order revoking the suspended sentence, vacated the sentence, and remanded the matter.[3]

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[3] Because the Montana Supreme Court vacated Imlay's sentence and because the original sentence was based primarily on the condition that Imlay undergo sex offender treatment, the state district court, on remand, had little alternative but to sentence Imlay to prison without the condition or recommendation that he undergo both phases of inpatient sex offender treatment that would require acceptance of responsibility for the crime of which he had been convicted and without the recommendation that Imlay receive ongoing treatment upon parole.

Subsequent to the filing of the petition for certiorari, Imlay filed a *pro se* petition for writ of habeas corpus in the Montana Supreme Court challenging the resentencing, claiming he was improperly denied parole and his counsel was ineffective for failing to challenge the resentencing. Imlay did not challenge his conviction in the habeas petition. Interestingly, Imlay's challenge to the denial of parole is based upon the argument that the Montana Board of Pardons improperly denied parole for failure of Imlay to go through Phase I of the sex offender treatment program at the prison. Phase I of the sex offender program at the prison is only an educational phase and does not require acceptance of responsibility of the crime for which a defendant has been convicted. Successful completion of Phase I of the prison program would therefore not be affected by the Montana Court's decision. The State's response to the state habeas petition is due April 24, 1992.

The decision below does potentially restrict prison authorities and the parole board from requiring completion of Phase II of the sex offender treatment at the prison because Phase II of the prison program requires acceptance of responsibility of the crime of which an inmate has been convicted. Because the Montana Supreme Court expressly overruled *State v. Donnelly*, 798 P.2d 89 (Mont. 1990) (privilege against self-incrimination is

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SUMMARY OF ARGUMENT

The Fifth Amendment privilege against self-incrimination provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself."[4] Governments may not "by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1 (1964). Impermissible governmental coercion arises when the government places an individual in a situation where he or she must make the Hobson's choice between giving incriminating statements or incurring a potent sanction. *Garrity v. State of New Jersey*, 385 U.S. 493, 496 (1967); *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977). Imlay was never forced to make an impermissible, coerced choice violative of his Fifth Amendment privilege against self-incrimination because the probation condition did not require him to make incriminating

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not violated by denial of parole for failure to complete sex offender program at prison), the Board of Pardons and the prison administration could be precluded from requiring completion of Phase II of the sex offender program. As a result, sex offenders could become eligible for parole without obtaining meaningful treatment.

[4] Imlay has never exercised his Fifth Amendment rights in the traditional fashion of refusing to answer on the grounds that his statements might incriminate him in a future criminal prosecution. He has merely maintained his innocence, continuing to deny that he committed the offense. The Montana Supreme Court found, however, that Imlay had adequately preserved a Fifth Amendment challenge to the probation condition when Imlay claimed at the revocation hearing that the condition improperly compelled an admission of guilt. *See* Pet. App. at 8a; Tr. Vol. IIB at 55.

statements and because revocation of probation is not a penalty that triggers Fifth Amendment protections.

Because this matter arose in a probationary setting designed to promote treatment and rehabilitation and because Imlay had already been convicted and sentenced of the sexual assault, the Fifth Amendment privilege against self-incrimination was never really pertinent, much less controlling. After conviction of the sexual assault, Imlay could have initially received a five-year prison sentence, with no years suspended.[5] The sentencing court, however, showed considerable leniency and gave Imlay the opportunity for treatment by suspending his sentence on the condition that he complete sex offender therapy. The therapy was designed to help Imlay overcome his denial and lead him toward meaningful rehabilitation.[6] When it became apparent that Imlay could not benefit from outpatient sex offender therapy and was not amenable to such treatment because of his continued denial, his probation was revoked. Such a scenario does not give rise to valid and controlling Fifth Amendment considerations.

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[5] Mont. Code Ann. § 45-5-502(3) (1989).

[6] The acceptance of responsibility and overcoming denial of a problem are widely accepted as the first steps toward rehabilitation. A basic objective in modern penology is to have the punishment "fit the offender and not merely the crime," *Williams v. New York*, 337 U.S. 241, 247 (1949), and accordingly sentences must be structured "with an eye toward 'reformation and rehabilitation of offenders.' " *United States v. Grayson*, 438 U.S. 41, 45 (1978). This philosophy is reflected in § 3E1.1, U.S.S.G. and discussed in the brief submitted by *amicus curiae* American Professional Society on the Abuse of Children.

The Fifth Amendment privilege against self-incrimination addresses only a relatively narrow scope of inquiries. The constitutional right to remain silent does not arise unless the testimony sought by the government would subject the giver to criminal liability. *Garner v. United States*, 424 U.S. 648, 655 (1976). An individual may therefore be compelled to provide statements in a noncriminal investigation. *Id.*, citing *Gardner v. Broderick*, 392 U.S. 273, 278 (1968).[7]

Imlay's statements relating to acceptance of responsibility were sought solely for treatment purposes. When a state seeks statements for treatment and rehabilitation purposes, rather than for the purposes of incrimination and punishment, the Fifth Amendment privilege does not protect such statements. *Allen v. Illinois*, 478 U.S. 364 (1986).

The statements concerning acceptance of responsibility for the crime also did not realistically subject Imlay to the threat of future criminal prosecution. The Fifth Amendment privilege protects only answers that might incriminate a defendant *"in future criminal proceedings."* *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (emphasis

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[7] In *Gardner*, this Court held that the Fifth Amendment privilege precluded a policeman's dismissal for his refusal to waive immunity in response to questions concerning alleged bribery and corrupt practices of police officers. The holding was qualified, however, by the recognition that Fifth Amendment protections would not extend to questions concerning the police officer's performance or other questions that would not expose the officer to future criminal prosecution.

added). Imlay had already been convicted of and sentenced for the crime by the time he was asked to discuss it.[8] Imlay did not appeal his conviction, so discussion of the crime would not jeopardize an appeal. The Montana Supreme Court suggested that Imlay might be jeopardizing his ability to collaterally attack his conviction or might be exposing himself to a possible perjury charge if he accepted responsibility of the crime. The risk to possible future collateral attacks of the conviction or the threat of a possible perjury charge are of such a speculative and unrealistic nature, however, that neither can be considered sufficient to create a viable threat to Imlay's Fifth Amendment privilege against self-incrimination.

The State's interest in supervising its probationers and devising appropriate treatment for them while protecting society is a crucial consideration in determining the extent of Imlay's Fifth Amendment privilege. The concerns for proper treatment and public safety justify, on the one hand, the attempt at rehabilitation through imposition of the condition requiring acceptance of responsibility and, on the other hand, justify revocation of probation when the treatment has failed. There was therefore never any type of "penalty" imposed upon Imlay for a valid exercise of his Fifth Amendment privilege against self-incrimination.

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[8] It is axiomatic that the self-incrimination which the Amendment forbids is exposure to a criminal charge. *Ullmann v. United States*, 350 U.S. 422, 431 (1956). Thus, once the threat of incrimination ceases, the amendment ceases to apply. *Reina v. United States*, 364 U.S. 507, 513 (1960).

The Montana Supreme Court's decision has had a detrimental effect on the sentencing options available to state district courts, and consequently severely restricted the opportunities for treatment of defendants. If the Montana Court's decision were left to stand as controlling law in Montana or accepted by other forums as persuasive authority, a sentencing court could not impose a probation condition, based on concerns for treatment and rehabilitation, that requires discussion of pertinent behavior in order to break through denial of the acts of which a probationer has already been convicted. The decision effectively eliminates the possibility of effective treatment or therapy for sexual offenders, like Imlay, who maintain denial of a behavioral problem, and requires incarceration without treatment as the only sentencing option. The privilege against self-incrimination was never intended to be used to a defendant's detriment, blocking possible treatment in a community-based setting.

ARGUMENT

I. A PROBATIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED BY IMPOSITION OF A PROBATION CONDITION WHICH ULTIMATELY REQUIRES ACCEPTANCE OF RESPONSIBILITY OF THE CRIME FOR WHICH THE PROBATIONER HAS BEEN CONVICTED.

The probation condition requiring sex offender treatment gave Imlay the choice of either discussing with a therapist the acts of which he was convicted and suffering no further realistic threat of a criminal penalty, or

maintaining his innocence and facing potential probation revocation. This choice did not place Imlay in a coercive situation where Fifth Amendment concerns might be controlling because Imlay did not have to choose between making incriminating statements or suffering a potentially impermissible penalty. The suspended sentence given to Imlay on the condition that he undergo sex offender therapy was a lenient sentence, designed to provide him with the benefit of treatment in a community-based program.

Moreover, Imlay, as a convicted defendant and a probationer, was subject to the reasonable and necessary principles and considerations governing a state's authority to impose a probation condition rationally related to Imlay's rehabilitation and to revoke probation when the attempt at rehabilitation failed. That successful completion of the condition required Imlay to accept responsibility of the crime of which he had been convicted did not violate Imlay's Fifth Amendment privilege against self-incrimination because acceptance of responsibility of criminal behavior is generally accepted as the first essential step toward meaningful treatment and because his acceptance would not subject him to future criminal liability.

A. The Probation Condition Requiring Sex Offender Treatment Is Rationally Related to the Goals of Sentencing.

The broad discretion of the sentencing judge to devise the most appropriate sentence designed with rehabilitation in mind is unquestioned. The Ninth Circuit

Court of Appeals described the purposes of probation in this way:

> The development of a sensible probationary system necessarily requires that the trial court be vested with broad discretionary powers. It also requires that any condition which is imposed following conviction, whether or not it touches upon "preferred" rights, must be viewed in the context of the goals underlying the [Federal Probation] Act. Thus, the crucial determination in testing probationary conditions is not the degree of "preference" which may be accorded those rights limited by the condition, but rather whether limitations are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public.

United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.14 (9th Cir. 1975). Here, the concern for rehabilitation was the driving force behind the initial sentence and later the revocation of probation. Mont. Code Ann. § 46-18-201(a)(xii) provides that a sentencing court may impose any reasonable condition considered necessary for rehabilitation or protection of society. The sentencing court was following this provision in imposing the condition that Imlay complete sex offender therapy, and ultimately accept responsibility for the sexual assault. *See also* brief of *amicus curiae*, American Professional Society on the Abuse of Children; § 3E1.1, U.S.S.G., which allows for two-point reduction of sentence for acceptance of responsibility. A probation condition requiring acceptance of responsibility is valid on its face since it is rationally related to the rehabilitation of a defendant. *See Gollaher v. United States*, 419 F.2d 520 (9th Cir. 1969) (recognition of fault is first step toward rehabilitation);

United States v. Hull, 792 F.2d 941 (9th Cir. 1986) (may impose harsh sentence for refusal to admit guilt).

B. Statements Sought for the Purpose of Treatment or Therapy Are Not Considered Incriminating Under the Fifth Amendment Privilege Against Self-incrimination.

The statements concerning acceptance of responsibility were never sought by the State of Montana with the purpose to obtain information to be used against Imlay in a future criminal prosecution. Indeed, the purpose was exactly the opposite. The purpose of obtaining the statements was to aid Imlay in overcoming his denial, thereby taking the first step toward meaningful rehabilitation. When a state solicits statements for the purposes of rehabilitation, rather than punishment or incarceration, the statements cannot be considered incriminating.

This Court, in explaining the boundaries of the Fifth Amendment privilege, has recognized a critical distinction between statements that may be used for punishment and statements that may be required solely for the purposes of treatment and rehabilitation. In *Allen v. Illinois*, 478 U.S. at 372, this Court held that the right against self-incrimination did not apply to an Illinois proceeding in which a defendant was designated a sexually dangerous person, stating:

> The Court in *Gault* [387 U.S. 1 (1967)] was obviously persuaded that the State intended to *punish* its juvenile offenders, observing that in many States juveniles may be placed in "adult penal institutions" for conduct that if committed by an adult would be a crime. . . . Here, by contrast,

> the State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment. That the Menard Psychiatric Center houses not only sexually dangerous persons but also prisoners from other institutions who are in need of psychiatric treatment does not transform the State's intent to treat into an intent to punish. [Emphasis in original.]

478 U.S. at 373. Statements required for treatment and rehabilitation rather than for punishment generally do not fall within the parameters of Fifth Amendment protections. *See also Taylor v. Best*, 746 F.2d 220, 224 (4th Cir. 1984), *cert. denied*, 474 U.S. 982 (1985) (no Fifth Amendment violation when the clear purpose of the mental evaluation is to assign the prisoner to the appropriate institution at the appropriate custody level with a basic program plan for treatment that fits his rehabilitation and training needs). Here, treatment, not the solicitation of incriminating statements, was a primary objective in devising the probation condition and then later in revoking probation. Given that the intention of the treatment was not to solicit incriminating statements, there can be no violation of the Fifth Amendment.

C. The Statements Sought From Imlay Concerning the Crime for Which He Had Been Convicted Do Not Pose a Realistic Threat of Future Criminal Prosecution.

To assert the privilege against self-incrimination, an individual must be "confronted by substantial and 'real', and not merely trifling or imaginary, hazards of incrimination." *United States v. Apfelbaum*, 445 U.S. 115, 128

(1980), quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968); *see also Rogers v. United States*, 340 U.S. 367, 374-75 (1951); *Brown v. Walker*, 161 U.S. 591, 599-600 (1896).

There was no danger or realistic threat that Imlay's discussion of the crime of which he had been convicted could be used to incriminate him in any future criminal proceedings. He was convicted of the sexual assault and could not again be so convicted. As a general rule, once a person is convicted of a crime, he no longer may assert the privilege against self-incrimination with regard to those acts because he can no longer be incriminated by his testimony about the crime. *Reina v. United States*, 364 U.S. at 513. In *State v. Gleason*, 576 A.2d 1246 (Vt. 1990), the Vermont Supreme Court summarily rejected a probationer's claim that his Fifth Amendment privilege against self-incrimination was violated by having to complete sex offender therapy and accept responsibility of the crime for which he had been convicted. The Vermont Court stated that "the imposition of sentence extinguishes the privilege against self-incrimination with respect to the crime of which the accused is convicted and, because of the protection against double jeopardy, defendant faces no threat of subsequent prosecution for the offense." *Id.* at 1250. *See also State v. Post*, No. 57846-0 (Wash. S. Ct. Mar. 12, 1992) (statements not incriminating that related to crime for which defendant was convicted).

Imlay had already been convicted and sentenced,[9] and the period for appeal time had expired when the

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[9] When Imlay was initially sentenced, his testimony at trial in which he denied the sexual assault was not used against him. In fact, he was shown leniency through a suspended sentence designed to help him overcome the denial of

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concerns over his Fifth Amendment rights arose.[10] Because his appeal time had run, the possibility of self-incrimination with respect to the crime of which he had been convicted was basically nonexistent.[11]

The Montana Supreme Court suggested that by successfully completing treatment and accepting responsibility for the crime of which he had been convicted, Imlay would be forfeiting his opportunity to challenge

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his behavioral problem. In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court recognized that the privilege against self-incrimination extends into the sentencing stage of a capital case, reasoning that "[j]ust as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument of his own conviction' . . . it protects him as well from being made the 'deluded instrument' of his own execution." 451 U.S. at 462.

The fears which motivated this Court to extend the Fifth Amendment privilege in *Estelle* are simply not present here. Because the condition of probation requiring sex offender treatment was, in fact, an act of leniency designed to promote rehabilitation and treatment, Imlay's Fifth Amendment privilege was not infringed when the condition was initially imposed.

[10] Under Rule 5(b), Mont. R. App. P., an appeal from a judgment in a criminal case must be taken within 60 days of conviction.

[11] *See United States v. Gonzalez-Mares*, 752 F.2d 1485, 1490 n.5 (9th Cir.), *cert. denied*, 473 U.S. 913 (1985) (after conviction, the danger of introducing responses to a probation officer's questions at trial is virtually non-existent); *McCormick on Evidence*, § 121 at 290-91 (3d ed. 1984) (only where appeal as of right is pending or is still available have the courts lent a sympathetic ear to the argument that disclosures concerning the crime might be used in a reprosecution).

his conviction on collateral attack or if there were newly discovered evidence. (Pet. App 14a.) The privilege against self-incrimination is not based on such vague and indefinite possibilities. Because Imlay no longer had any fear of self-incrimination after conviction, he logically could not invoke the privilege in postconviction proceedings. *McQueen v. Commonwealth*, 721 S.W.2d 694, 703 (Ky. 1986) (a petitioner has no privilege against self-incrimination in state postconviction proceedings with respect to statements concerning the crime for which he already has been convicted, citing the general rule in *Reina*); *Gall v. Commonwealth*, 702 S.W.2d 37, 45 (Ky. 1985), *cert. denied*, 478 U.S. 1010 (1986). *See also United States v. Heldt*, 668 F.2d 1238, 1253 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 426 (1982) (grand jury witness may not invoke privilege of self-incrimination with respect to crimes of which he was already convicted).[12] Because Imlay has never challenged

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[12] Two states have taken rather equivocal positions in deciding that the Fifth Amendment privilege extends to postconviction proceedings on a case-by-case basis and turns upon whether there is a "real and appreciable" danger of self-incrimination that would jeopardize collateral relief. *State v. Verdugo*, 602 P.2d 472 (Ariz. 1979) (threat of incrimination was "imaginary and insubstantial" because the appellant's conviction had been affirmed on appeal four years earlier, no petition for postconviction relief had been filed, and defense counsel estimated that the likelihood of success on collateral attack was only 15 to 30 percent); *Commonwealth v. Rodgers*, 372 A.2d 771 (Pa. 1977) (determination of whether witness whose conviction has been finalized on appeal and who is preparing a collateral

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his conviction, no harm can result from discussion of the crime for which he was convicted and there can be no real or substantial threat to the privilege against self-incrimination in collateral proceedings.[13]

The Montana Court also suggested that Imlay's statements to a therapist admitting that he had committed the crime might expose him to a perjury charge. (Pet App.14a.)[14] This suggestion is without realistic legal

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attack may invoke privilege against self-incrimination is left to discretion of trial court); *but see Commonwealth v. Strickler*, 393 A.2d 313 (Pa. 1978); *Commonwealth v. Long*, 583 A.2d 428 (Pa. Super. Ct. 1990) (disapproving of *Rodgers* and finding no privilege of self-incrimination after conviction).

[13] After conviction and sentencing are completed, and the time for appeal has run, a case is deemed final. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Imlay's conviction is now deemed final because it has never been timely appealed. It would seem contrary to the concept of finality to preclude a state from proceeding with appropriate treatment because, at some point, a defendant might want to collaterally attack his conviction. Further, it would seem contrary to the concept of finality to preclude treatment because someday new evidence may be discovered that would exonerate a defendant. Once a conviction is final, and because the Fifth Amendment prohibits only a realistic threat of future criminal prosecution, these mere possibilities should not be considered controlling in light of the necessity to proceed with appropriate treatment.

[14] It is interesting that there is no indication in the record that Imlay refused to accept responsibility at treatment because of fear of a perjury charge. This concern was raised for the first time by the Montana Supreme Court. The Montana Court's concern about perjury arose from its misplaced reliance on the

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foundation. In the first instance, admitting to a crime in therapy is not perjury under Montana law.[15] Further, under Montana law, statements made in therapy cannot be used in a subsequent criminal prosecution. *State v. Thiel*, 768 P.2d 343, 345 (Mont. 1989) (violation of Fifth Amendment privilege occurs if future charges are based on uncharged criminal acts that are revealed during a mental evaluation). Because any statement that Imlay made in therapy could not be used as proof of perjury, he was never under a realistic threat of future prosecution of the crime.[16]

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case of *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). In *Thomas*, the sentencing court threatened the defendant with a longer sentence unless he confessed to the court that he was guilty of the crime of which he had been convicted. Imlay's situation was much different from that of a defendant standing in open court. Imlay's statements would have been given in a treatment setting where he would be discussing a behavioral problem and where such statements are protected.

[15] Mont. Code Ann. § 45-7-201, MCA, provides that a "person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made, when the statement is material."

[16] Even if Imlay's statements to a therapist could somehow be construed as evidence that Imlay had lied at trial and thereby perjured himself when he denied the crime, Imlay's Fifth Amendment privilege would not shield him from such a charge. Imlay did not exercise his Fifth Amendment privilege at trial, but instead freely testified in his own behalf, denying the crime. Once a witness proceeds to freely testify in his own defense or even through compelled immunized testimony, it is well settled that the Fifth Amendment privilege does not

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Further, such an unrealistic threat carries little weight when considered with the otherwise overriding concerns of the state in supervising its probationers and administering appropriate treatment programs that foster rehabilitation. In *United States v. Henry*, 883 F.2d 1010 (11th Cir. 1989), one of the issues was whether the federal sentencing guideline allowing a two-point sentence reduction for acceptance of responsibility violated the defendant's Fifth Amendment privilege because it exposed him to possible perjury charges. The Court of Appeals had little difficulty in summarily dismissing the perjury argument. The Court refused to equate the possibility of leniency with impermissible punishment and

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protect perjured testimony. In *Harris v. New York*, 401 U.S. 222, 225 (1971), this Court stated that "[e]very criminal defendant is privileged to testify in his own defense, or refuse to do so. But that privilege cannot be construed to include the right to commit perjury." Imlay had no Fifth Amendment protections that extended to his false testimony. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). Imlay, therefore, would not be shielded by the Fifth Amendment with respect to his testimony, perjured or otherwise, that was freely given at trial.

Such reasoning has also been uniformly followed in the context of a witness who committed perjury while testifying under the grant of immunity. *See United States v. Mandujano*, 425 U.S. 564, 583-84 (1976) ("[The Fifth Amendment] privilege cannot be construed to include the right to commit perjury," quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)); *United States v. Wong*, 431 U.S. 174, 180 (1977) (" 'Our legal system provides methods for challenging the Government's right to ask questions – lying is not one of them.' " (*quoting Bryson v. United States*, 396 U.S. 64, 72 (1969)); *United States v. Apfelbaum*, 445 U.S. at 126 (grant of immunity does not preclude prosecution for perjured testimony given under grant).

found that the choice imposed by the sentencing guideline was constitutionally permissible. *See* § 3E1.1, U.S.S.G.; *United States v. Rowland*, 906 F.2d 621 (11th Cir. 1990) (reaffirming perjury analysis in *Henry* by holding that § 3E1.1 is not a penalty but rather provides for leniency); *United States v. Gonzalez*, 897 F.2d 1018, 1021 (9th Cir. 1990) (risk of perjury is not controlling consideration because sentencing guideline is considered a benefit rather than punishment).

Similarly, with respect to the condition that a probationer complete sex offender therapy and accept responsibility for the crime of which he was convicted, the condition provides a means of granting leniency and providing the benefit of treatment for an offender in a community-based program. It is therefore illogical and inconsistent to inject the threat of perjury into this setting. As the Eleventh Circuit recognized in *United States v. Henry, supra,* and the Ninth Circuit recognized in *United States v. Gonzalez, supra,* the risk of perjury may not be used to preclude the benefit of leniency and treatment.

II. THE THREAT OF REVOCATION OF PROBATION FOR FAILURE TO ACCEPT RESPONSIBILITY OF THE CRIME OF WHICH A PROBATIONER HAS BEEN CONVICTED IS NOT A PENALTY THAT TRIGGERS FIFTH AMENDMENT PROTECTIONS.

Because this matter involves supervision of a probationer, the controlling cases are necessarily those that set the parameters of a probationer's rights and privileges, and those that establish the propriety of revoking probation when treatment has failed or when the safety of the

community becomes a paramount concern. In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), this Court recognized that a probation revocation proceeding is not a criminal prosecution, but rather a civil proceeding.[17] Consequently, a probationer has no Fifth Amendment rights with respect to statements that would result in revocation of the probation unless the statements would also serve to incriminate the probationer in future criminal proceedings. *Minnesota v. Murphy*, 465 U.S. at 435, n.7; *Lefkowitz v. Turley*, 414 U.S. at 77. With respect to answers concerning compliance with his probationary condition, Imlay essentially had no Fifth Amendment rights.[18]

Because a truthful response to the therapist's questions were solicited solely for treatment purposes and not to further a future criminal prosecution, the State of Montana properly insisted that Imlay respond or suffer the consequences of revocation. *See Minnesota v. Murphy*, 465 U.S. at 441-42 (Marshall, J., dissenting). Revocation of

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[17] "Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." *Gagnon*, 411 U.S. at 782.

[18] *See also United States v. Gonzalez-Mares*, 752 F.2d at 1489-90 (*citing Murphy* for the general rule that a probationer is not entitled to invoke the privilege against self-incrimination in response to questions about probation status); *Wilson v. State*, 621 P.2d 1173 (Okla. Crim. App. 1980) (revocation proceeding is not a criminal proceeding for Fifth Amendment purposes); *State v. Burow*, 394 N.W.2d 665, 667 (Neb. 1986) (*quoting Murphy* and holding that the privilege against self-incrimination affords no protection in a probation revocation proceeding). The effect of this now widely accepted rule is that Imlay could not validly say, "I refuse to answer on the grounds that my probation may be revoked."

probation, free from due process violations, is a valid exercise of a court's power to terminate a supervised community-based course of rehabilitation. As this Court has stated:

> "Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail."

Gagnon v. Scarpelli, 411 U.S. at 785 (emphasis in original.)[19] Here, it is undisputed that the attempt at treating Imlay in an outpatient setting failed. The sentencing court revoked Imlay's probation in order to provide more structured, daily inpatient sex offender therapy available only at the Montana State Prison. The revocation by the sentencing court was in accordance with the generally accepted view, as recognized in *Gagnon*, that if the treatment on which probation is based fails, then probation may be revoked.[20]

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[19] Quoting F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, *Criminal Justice Administration, Materials and Cases* 910-911 n.7 (1969).

[20] Other states have readily found that failure to accept responsibility as part of a probationary condition indicates a violation of a valid condition and revocation is appropriate. *See, e.g., State v. Gleason, supra* (failure to accept responsibility in sex offender treatment was sufficient to justify revocation of

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That revocation resulted in incarceration did not necessarily trigger Fifth Amendment concerns. Disapproving of prior statements in the opinion in *In re Gault*, 387 U.S. at 50, this Court in *Allen v. Illinois, supra*, stated: "First, *Gault*'s sweeping statement that 'our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty' . . . *is plainly not good law.*" 478 U.S. at 372 (emphasis added) (citation omitted). Even though Imlay's denial of the crime may result in revocation, loss of liberty does not offend the privilege against self-incrimination because the loss was based upon a concern for treatment and rehabilitation, rather than punishment.

Moreover, implicit in *Minnesota v. Murphy, supra*, is the conclusion that revocation of probation does not create a coercive situation when revocation is directly

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probation); *State v. Orseth*, 359 N.W.2d 852 (N.D. 1984) (failure to comply with chemical dependency treatment by not confronting problem and merely attending meetings was sufficient to revoke probation); *State v. Rock*, 380 N.W.2d 211 (Minn. Ct. App. 1986) (lack of a desire to change and little motivation in sex offender treatment program sufficient to revoke probation); *State v. Bennett*, 666 P.2d 390 (Wash. Ct. App. 1983) (probation properly revoked because probationer not amenable to sex offender treatment); *State v. Smith*, 812 P.2d 470 (Utah Ct. App. 1991) (revocation may be based on inability to complete sex offender program because of psychological denial). *Cf. Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991) (probation may not be revoked for failure to accept responsibility for crimes of which defendant was convicted); *People v. Prusak*, 558 N.E.2d 696 (Ill. App. Ct. 1990) (probation revocation improper when based on failure to accept responsibility for sexual misconduct).

related to the failure of a probationary condition. While recognizing that it would be improper to threaten revocation in order to have a probationer reveal acts concerning uncharged conduct, this Court stated in a very important qualifying footnote:

> The situation would be different if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding. . . . Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. . . . Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer. . . .
>
> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. . . . [A]nd nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by the finder of fact" in deciding whether other conditions of probation have been violated. *Lefkowitz v. Cunningham, supra,* 431 U.S., at 808, n. 5, 97 S.Ct., at 2137, n. 5. *See Baxter v. Palmigiano,* 425 U.S. 308, 317-318, 96 S.Ct. 1551, 1557-1558, 47 L.Ed.2d 810 (1976).

Minnesota v. Murphy, 465 U.S. at 435, n.7 (some citations omitted). Revocation for failure to accept responsibility of the crime of which a probationer has been convicted is therefore appropriate and valid when it is based upon a failure of the probation condition itself and not upon a probationer's refusal to reveal incriminating statements that pose a realistic threat of future prosecution.

The State's interest in protecting the safety of the public is also a fundamental consideration in designing a probation condition and eventually deciding when to revoke probation. Here, Imlay's probation officer testified that her largest concern was the risk that Imlay posed to the community. In her assessment, an offender who maintains denial is "obviously in greater risk of reoffending than one who is recognizing and accepting responsibility for his problem." (Tr. at 11.) Michael Sullivan, Imlay's therapist, echoed this concern stating that it was unethical for him to continue outpatient treatment of a person who was in denial and therefore a threat to community safety. (Tr. at 42.)[21]

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[21] In its original sentencing order, the sentencing court stated that it had accepted the defense attorney's representations that Imlay "is not a dangerous person and that the present offense was an isolated incident which will not be repeated in the future." (J.A. 21.) In light of the subsequent testimony at the revocation hearing indicating that Imlay's denial made him a threat for reoffending and a possible danger to the community, and the sentencing court's decision to revoke probation, it may be assumed that the sentencing court reevaluated its original impression of the prospects of Imlay reoffending.

The concerns for proper treatment and public safety justify the imposition of an appropriate probation condition, and the attendant "enforcement leverage" of probation revocation. *Morrisey v. Brewer*, 408 U.S. 471, 478-79 (1972). In *Morrisey*, in the context of parole revocation, this Court acknowledged the propriety of the state imposing restrictions upon a parolee's freedom and enforcing those restrictions when deemed necessary:

> Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

408 U.S. at 483. Because Imlay maintained his denial, he was considered by his probation officer as a continuing threat to the welfare of the community due to the likelihood of reoffending.

The Montana court nevertheless considered the revocation a type of "penalty," thereby presumably invoking the decisions from this Court involving witnesses who had been compelled to testify and forced to choose between the valid exercise of Fifth Amendment rights and the imposition of economic or other sanctions.[22] The penalty cases are not controlling here because

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[22] *See Garrity v. State of New Jersey, supra* (statements made under the threat of removal from office may not be used in

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this matter involves imposition of an appropriate probation condition designed to further treatment of a probationer. The threat of revocation as part of the necessary and proper administration of a state's probation system cannot be equated with the threat of economic sanctions upon the valid assertion of Fifth Amendment rights. Because the probation system involves the overwhelming interest of the state in supervising its probationers and protecting the public, the threat of revocation and revocation itself are constitutionally valid exercises of the state's authority to protect the public and determine the appropriate treatment for convicted defendants.

While the penalty cases recognize that a state employee could not be given the Hobson's choice of losing a job or exercising the Fifth Amendment privilege, the cases concurrently recognize that individuals "may be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions." *Lefkowitz v. Turley*, 414 U.S. at 79. Thus, certain questions are permissible as is the attendant enforcement for failure

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subsequent criminal proceedings); *Gardner v. Broderick, supra* (discharge from employment for refusal to waive privilege against self-incrimination is violative of Fifth Amendment); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280 (1968) (loss of employment is an impermissible penalty for exercising privilege against self-incrimination); *Lefkowitz v. Turley, supra* (threat of substantial economic sanctions creates involuntary waiver of Fifth Amendment privilege); *Lefkowitz v. Cunningham, supra* (regulation requiring waiver of Fifth Amendment privilege or loss of political office imposed impermissible penalty for exercising privilege).

to respond to such questions if the questions and responses relate to the public interest and do not hinder the Fifth Amendment privilege. In *Uniformed Sanitation Men, supra,* this Court stated:

> Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination [citing cases]. At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings which do not involve an attempt to coerce them to relinquish their constitutional rights.

392 U.S. at 284-85. Similarly, Imlay, as a probationer, subjected himself to the conditions that the state deemed necessary for his rehabilitation and treatment, and which provided adequate protection of society. Imlay's continued denial indicated a failure of treatment and thus the public interest in community safety and inpatient treatment for Imlay became the controlling considerations. The revocation therefore offended no constitutional principles.

The Second Circuit Court of Appeals recently applied similar reasoning in *Asherman v. Meachum,* No. 90-2530 (2d Cir. Feb. 13, 1992) (en banc), reversing the panel decision in *Asherman v. Meachum,* 932 F.2d 137 (2d Cir. 1991). In *Asherman* a federal habeas petitioner claimed that his privilege against self-incrimination was violated when his supervised home release status was revoked because of his refusal to undergo a mental examination concerning the crime for which he was convicted. The

Court of Appeals held that public agencies have the authority to ask questions relevant to their public responsibilities and to take adverse action against those whose refusal to answer impedes the discharge of those duties. The inquiry and sanctions were proper as long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right. Similarly, Imlay's revocation was proper, as it was based on his failure to complete treatment, not on a refusal to give up a constitutional right.

III. *THOMAS* AND SIMILAR CASES ARE NEITHER APPLICABLE NOR CONTROLLING.

The Montana Supreme Court relied almost exclusively upon the reasoning in *Thomas v. United States, supra*. In *Thomas*, the sentencing judge had told the defendant, after he had been convicted but just before sentencing, that if he would "come clean" the court would take his acceptance of responsibility into account in determining the length of the sentence. But if the defendant persisted in denying that he had participated in the robbery for which he had been convicted, the court would also consider his denial. 368 F.2d. at 945, n.10. The defendant denied his participation in the robbery and the court imposed the maximum sentence. The Fifth Circuit Court of Appeals reversed the sentencing decision, holding that Thomas retained his Fifth Amendment rights because he had not been finally and irretrievably adjudged guilty, and still had the option to appeal. Also, the Court noted that Thomas could not be forced to abandon his Fifth

Amendment protections as to perjury or postconviction remedies.

The *Thomas* decision is readily distinguishable both factually and legally from Imlay's case. First, Imlay's failure to accept responsibility for the crime for which he was convicted did not involve an increase or augmentation in his sentence. Imlay's sentence was suspended and he was initially given the opportunity for outpatient treatment, despite his denial of the crime. At the sentencing stage, he was therefore not penalized in any way for failing to accept responsibility of the crime. Moreover, because Imlay did not appeal his conviction or initial sentence, any statements made during therapy could not be used to jeopardize a possible appeal.

Two opinions of this Court supersede the reasoning used in the *Thomas* decision that a sentencing court may not consider a defendant's denial of the crime of which he was convicted. In *United States v. Grayson, supra,* this Court considered the issue of whether it was improper for a sentencing judge, in fixing a sentence within the statutory limits, to give consideration to the defendant's false testimony observed by the judge during the trial. The false testimony to which the Court referred was simply the defendant's denial of the offense in the face of contradictory evidence. This Court found consideration of the denial proper, reasoning that a "defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." 438 U.S. at 50. Thus, such evidence was found to be not only proper, but necessary to the sentencing decision:

> [T]he evolutionary history of sentencing, set out in Part II, demonstrates that it is proper – indeed, even necessary for the rational exercise of discretion – to consider the defendant's whole person and personality, as manifested by his conduct at trial, and his testimony under oath, for whatever light that may shed on sentencing decisions.

438 U.S. at 53. *Grayson* supersedes the reasoning in *Thomas, supra,* because *Grayson* recognizes the propriety of considering, during the sentencing process, the defendant's denial of the acts of which he was convicted.

In *Roberts v. United States,* 445 U.S. 552 (1980), this Court upheld consideration at sentencing of a defendant's refusal to identify his drug supplier. It was conceded that cooperation with authorities was a laudable endeavor that bore a rational connection to a defendant's willingness to change his behavior. *Id.* at 557. Thus, the consideration at sentencing of the defendant's refusal to cooperate was appropriate because his refusal was an indicator of his prospects for his rehabilitation. Quoting *Grayson,* this Court stated:

> Few facts available to a sentencing judge are more relevant to "the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative effort to assist with a lawful future career, [and] the degree to which he does or does not deem himself at war with his society."

Roberts v. United States, supra, 445 U.S. at 558, *quoting United States v. Grayson, supra,* 438 U.S. at 51. The *Grayson* and *Roberts* decisions recognize that there is a critical difference between penalizing a defendant for remaining

silent or maintaining his innocence, and considering the defendant's character and prospects for treatment and rehabilitation as reflected in the defendant's willingness to accept responsibility for his criminal conduct. Because a sentencing court may consider all aspects of a defendant's character, including his denial of the act of which he was convicted, the *Thomas* decision lacks any persuasive authority to the extent it held that a defendant's denial of the crime may not be considered at sentencing.

The adoption of federal sentencing guideline § 3E1.1, which expressly allows a reduction in sentence for acceptance of responsibility also significantly diminishes the authoritative value of *Thomas*. The Fifth Circuit Court of Appeals, with no reference to its earlier decision in *Thomas v. United States*, expressly upheld the sentencing guideline when faced with a Fifth Amendment challenge. *See United States v. Mourning*, 914 F.2d 699 (5th Cir. 1990) (the government is permitted to award contrition which is not the same as compelling self-incrimination).

While the circuits differ somewhat as to whether § 3E1.1 encompasses criminal conduct other than that for which a defendant has been convicted, the circuits uniformly hold that the sentencing guideline does not offend the Fifth Amendment with respect to the crime for which a defendant has been convicted. *United States v. O'Neil*, 936 F.2d 599 (1st Cir. 1991) (no violation of -privilege against self-incrimination because sentencing court may require acceptance of responsibility of charged conduct as well as consider conduct after conviction and during bail); *United States v. Oliveras*, 905 F.2d 623 (2d Cir. 1990) (no violation of the privilege against self-incrimination with respect to the counts to which a defendant pled

guilty); *United States v. Frierson*, 945 F.2d 650 (3d Cir. 1991), *cert. denied*, No. 91-6849 (Mar. 23, 1992) (no violation of Fifth Amendment for sentencing court to consider acts of which defendant convicted as well as uncharged acts because statements were not "compelled" under *Minnesota v. Murphy*); *United States v. Gonzalez*, *supra* (Fifth Amendment not offended by defendant who seeks reduction under § 3E1.1 but who maintained his innocence throughout trial); *United States v. Rogers*, 921 F.2d 975 (10th Cir.), *cert. denied*, 111 S. Ct. 113 (1990) (no violation of Fifth Amendment because defendant was required to divulge circumstances of the crime for which he was convicted, not circumstances concerning unproved, uncharged conduct); *United States v. Henry*, *supra* (no self-incrimination violation for defendant who maintained innocence at trial because Court was unwilling to equate the possibility of leniency with impermissible punishment). Given the uniformity of these decisions which hold that consideration of acceptance of responsibility at the sentencing stage does not offend Fifth Amendment principles, *Thomas v. United States*, *supra*, can hardly be considered controlling.

CONCLUSION

The probation condition properly required Imlay to accept responsibility for the crime of which he was convicted as the first step toward meaningful rehabilitation. Further, the condition did not offend Fifth Amendment principles because it was designed for treatment purposes and did not require Imlay to make statements that

would realistically subject him to future criminal prosecution. Revocation of probation was not a penalty precluded by the Fifth Amendment privilege, but was appropriate and necessary when Imlay's continued denial made outpatient therapy unworkable. The Montana Supreme Court therefore incorrectly held that Imlay's Fifth Amendment privilege precluded the imposition of a probation condition requiring acceptance of responsibility of the crime of which he had been convicted and improvidently reversed the revocation of Imlay's suspended sentence.

The State of Montana therefore asks that the decision of the Montana Supreme Court be reversed.

Respectfully submitted,

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

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No. 91-687

In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ Of Certiorari To The
Montana Supreme Court

BRIEF FOR THE RESPONDENT

BILLY B. MILLER
Counsel of Record
600 Central Plaza, Ste. 300
Great Falls, MT 59401
(406) 727-5990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

WHETHER A PROBATIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT IS VIOLATED BY COMPELLING THE PROBATIONER, AS A CONDITION OF A SUSPENDED SENTENCE, TO ADMIT THAT HE IS GUILTY OF THE CRIME FOR WHICH HE HAS BEEN ACCUSED AND CONVICTED?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

1. A. PROBATIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS VIOLATED BY IMPOSITION OF A PROBATION CONDITION WHICH COMPELS PROBATIONER TO PARTICIPATE IN A SEXUAL OFFENDER PROGRAM WHEN THE PROGRAM REQUIRES HIM TO ADMIT GUILT IN ORDER TO PARTICIPATE 6

A. Newly discovered evidence was one of the Post Conviction reliefs available to Respondent at the time he was being compelled to admit guilt 7

B. Any admission by the Respondent which contradicts his prior testimony at trial subjects him to criminal prosecution for prejury 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Blair v. United States, 250 U.S. 273 (1919) 9

Fox v. State, 569 P.2d 1335 (Alaska 1977) 7

Mallory v. Hogan, 378 U.S. 1 (1964) 3

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) 10

Poteet v. Feuver, 517 F.2d 393 (3rd Cir. 1975) 7

Richard Roe v. United States, 847 F.2d 1024, 1028 (2nd Cir. 1988) 3, 6, 10

Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) 7

Ullmann v. United States, 350 U.S. 422, 426 (1964) 10

United States v. Acosta, 509 F.2d 539 (5th Cir. 1975) 7

United States v. Garcia, 544 F.2d 681, 685 (3rd Cir. 1976) 7

United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1974) 8, 9

United States v. Rogers, 504 F.2d 1079, 1085 (5th Cir. 1975) 7

United States v. Stockwell, 472 F.2d 1186 (1973) 7

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Montana Code Annotated Section 45-7-201

Perjury. (1) A person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made, when the statement is material.

2. Montana Code Annotated Section 46-18-112

Content of Presentence investigation report. Whenever an investigation is required, the probation officer shall promptly inquire into and report upon:

(a) The defendant's characteristics, circumstances, needs and potentialities.

3. Rule 59(b). Time for motion. A motion for a new trial shall be served not later than 10 days after service of notice of the entry of the judgments.

4. Rule 60(b) of the Montana Rules of Civil Procedures.

Mistakes, – inadvertence – excusable neglect – newly discovered evidence-fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time for a new trial under Rule 59(b).

STATEMENT OF THE CASE

Respondent Imlay agrees with the Petitioner's statement of the case with the exception of the following. The Court, after reviewing the pre-sentence report sentenced Respondent Imlay to five years probation upon the condition that he successfully complete a Sexual Offender Program. Respondent Imlay was seen by Therapist, Michael Sullivan in Billings, Montana, on six separate occasions. However, he was denied admission into the Sexual Offender Program solely because he refused to admit his guilt. (Tr. at 12.) Each of the six times that Respondent Imlay saw Therapist Sullivan the meeting was initiated by Respondent. (Tr. at 7.)

Respondent Imlay was never placed on a regular counselling schedule, nor was a formal plan devised to address his state of denial even though he attended each of the scheduled appointments, was always punctual and pleasant. (Tr. at 15.) After being rejected by the Billings program, Respondent attempted to enroll in another Sexual Offender Program located in Helena, Montana. However, he was again rejected for the same reason. (Tr. at 20.)

During the Revocation Hearing, Barbara Nihill, Respondent's Probation Officer, testified that denial is 75% of a sexual offender's rehabilitation process. (Tr. at 24.) Therapist Sullivan would not quantify the relationship of denial with rehabilitation. However, Sullivan did testify that accepting responsibility played an important part in the rehabilitation process. (Tr. at 12.) Sullivan testified further that there was a danger that Mr. Imlay would re-offend if left untreated. This was contrary to the findings of the court at the original sentencing. The court

stated at the original sentencing, after hearing all of the testimony at trial that it did not feel Respondent would re-offend.[1]

SUMMARY OF THE ARGUMENT

The right to remain silent has long been recognized as one of the great landmarks in man's struggle to make himself civilized. The Fifth Amendment right against self-incrimination has applied to the Federal Government since the inception of the Bill of Rights. It was made applicable to the states in *Mallory v. Hogan,* 378 U.S. 1 (1964). As this right evolved, the Second Circuit was later required to decide what kind of statement was necessary to trigger this Fifth Amendment protection. In deciding this issue, the Court in *Richard Roe v. United States,* 847 F.2d 1024, 1028 (2nd Cir. 1988) stated that in order to invoke the Fifth Amendment right against self incrimination, a defendant's statement must exhibit three qualities: (1) there must be testimonial communication; (2) it must be made by compulsion; and (3) it must be incriminating in nature.

The probation condition placed on Mr. Imlay to enroll and successfully complete a Sexual Offender Program by the trial court exhibits all three required elements necessary to invoke the Fifth Amendment right

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[1] No transcript was made of the original trial because Imlay did not appeal the original sentence. The court's statement regarding the chance of Respondent re-offending is repeated to the court by Respondent's attorney and is located in the revocation transcript on pages 59-60.

against self incrimination. First, the court was aware at the time of the original sentencing that the treatment program was not amenable to offer treatment to a man who maintains his innocence; second; that Respondent would have had to admit his guilt before he could comply with the condition of his probationary sentence, and third, the admission of guilt would be compelled, failure to be accepted into the Sexual Offender Program would mean Mr. Imlay would face the much harsher punishment of going to prison. There is no dispute regarding Respondent's willingness to enroll in a Sexual Offender Program. Furthermore, the District Court in its original order found that Respondent was not a danger to reoffend. Therefore, the only reason Respondent was found in violation of his probationary sentence and sent to prison was because he could not be accepted into any Sexual Offender Program.

The possibility of Respondent incriminating himself by admitting guilt stems from the fact that since he had maintained his innocence throughout his criminal proceedings, for him to now admit guilt would not only subject him to possible criminal prosecution for perjury, but he would also be giving up his right to seek Post-Conviction relief in the form of newly discovered evidence available to him by way of Rule 60(b), (2) of the Montana Rules of Civil Procedure. Respondent's reason for maintaining his innocence, even though required to serve time in prison, is that he hopes the victim will eventually come forward and recant her prior testimony and exonerate him. This form of newly discovered evidence would have no value to Respondent once he admits his guilt.

Whether or not there is a need for a Rehabilitation Program such as a Sexual Offender Program was not an issue before the Montana Supreme Court and the *Imlay* decision was not based on this issue. The Montana Supreme Court based its decision on the fact that the District Court erred in imposing such a condition on a probationary sentence when it was clear from the Pre-Sentence Report that Respondent was not amenable to treatment due to his denial. The Montana Supreme Court also found that as a result of this sentence, the District Court had demanded a price from the Respondent in exchange for the probationary sentence that was given to him. The price for remaining free on probation demanded that he waive his Fifth Amendment right to self-incrimination and successfully complete the Sexual Offender Program.

The *Imlay* case is being compared by the Montana Attorney General with an inmate's case who is required to complete a Sexual Offender Program while in prison. However, the two cases cannot be compared. An inmate who is required to complete the Sexual Offender Program in prison before being eligible for parole is in a different situation than is Respondent. The inmate's failure to complete the program only means that he would not be eligible for parole due to the noncompletion. However, a revocation of Respondent's suspended sentence because he would not waive his Fifth Amendment right against self incrimination resulted in a deprivation of Respondent's freedom.

ARGUMENT

I. A PROBATIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS VIOLATED BY IMPOSITION OF A PROBATION CONDITION WHICH COMPELS PROBATIONER TO PARTICIPATE IN A SEXUAL OFFENDER PROGRAM WHEN THE PROGRAM REQUIRES HIM TO ADMIT GUILT IN ORDER TO PARTICIPATE.

The discretion of the sentencing judge to decide the most appropriate sentence is not normally an issue. In Mr. Imlay's case, as in other cases, the major concern is rehabilitation. This was the reason for the initial sentence and, ultimately, was the reason for the revocation. However, placing Respondent on a probationary sentence with the condition that he successfully complete a Sexual Offender Program, when the court was aware from the Pre-Sentence Report that the treatment program was not amenable to treating a person in denial, constituted a violation of Respondent's Fifth Amendment right against self-incrimination. Pursuant to the three qualities stated by the Court in *Richard Roe v. United States, supra,* not only was Respondent being compelled to admit his guilt by being forced to enroll and complete the program, such an admission on his behalf would negate any chance he has of later being found innocent of the offense through newly discovered evidence. Furthermore, his admission could possibly cause a charge to be brought against him for perjury. The district court should have been aware of the violation of Respondent's right at the time of sentencing.

Montana Code Annotated Section 46-18-112 states in pertinent part that whenever a pre-sentence investigation

is required, the probation officer shall promptly inquire into and report upon the defendant's characteristics, circumstances, needs and potentialities. This report was completed and provided to the court before sentencing. The court's failure to take this information under consideration at the time of sentencing and when later revoking Respondent's probation shows a total disregard for Respondent's Fifth Amendment right and the decisions of the Court in *Thomas v. United States*, 368 F. 2d 941 (5th Cir. 1966), *Poteet v. Feuver*, 517 F. 2d 393 (3rd Cir.1975), *Fox v. State*, 569 P. 2d 1335 (Alaska 1977), *United States v. Garcia*, 544 F. 2d 681, 685 (3rd Cir.1976), *United States v. Acosta*, 509 F. 2d 539 (5th Cir.1975) and *United States v. Rogers*, 504 F. 2d 1079, 1085 (5th Cir.1975).

This Court stated in *United States v. Stockwell*, 472 F. 2d 1186, *cert. denied*, 411 U.S. 948, 36 L. Ed. 409, 93 S. Ct. 1924 (1973), that, "a defendant retains his Fifth Amendment rights after a jury verdict because the appellate process is still open to him, and that an enhanced sentence, solely for the reason that the defendant maintained his innocence, cannot stand." Even though Respondent's case was not on appeal at the time he attempted to comply with the condition of his probationary sentence, this should not be considered a waiver of other Post-Conviction rights available to Respondent.

A. Newly discovered evidence was one of the Post-Conviction reliefs available to Respondent at the time he was being compelled to admit guilt.

One form of Post-Conviction relief that is available to Respondent is newly discovered evidence which could

possibly exonerate him. The choice between probationary freedom and incarceration, for one who has maintained his innocence from the outset, is not an easy choice. However, if Respondent capitulates to the demand of the court and admits guilt, he would not only give up his chance of being exonerated, but he could also be charged with perjury for lying to the court during his testimony at trial.

The Montana Supreme Court's interpretation of a defendant's Fifth Amendment right against self incrimination is in total agreement with the decision in *United States v. Rodriguez*, 498 F. 2d 302 (5th Cir. 1974), in which this Court stated that, "a defendant retains important Fifth Amendment rights after the jury reaches a verdict, rights which must not be made the price of sentencing leniency. The court cannot place the defendant in the dilemma of either abandoning his rights or risking a harsher sentence." One of the rights that is available to Respondent is the right to motion the court to set aside the sentencing order if newly discovered evidence became available. Pursuant to Rule 60(b), (2) of the Montana Rules of Civil Procedure, Respondent would be able to set aside his conviction if "newly discovered evidence becomes available which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b)." By exercising his Fifth Amendment right against self-incrimination, the Respondent retains the ability to be exonerated if the victim comes forward and recants her testimony. On the other hand, if he admits guilt in order to comply with his probationary sentence and remain out of prison, he would have little or no chance of being exonerated, even if at a later date, the

victim would come forward and recant her prior testimony. The court would look upon the victim's recantation with some skepticism if it came after Respondent had admitted guilt in order to be accepted into the Sexual Offender Program. The demand that the district court placed upon Mr. Imlay clearly was a violation of his Fifth Amendment right against self-incrimination because it went against not only the spirit, but also the letter of the law in *Rodriguez, supra.*

B. Any admission of guilt by Respondent which contradicts his testimony at trial would subject him to criminal prosecution for perjury.

The condition placed on Respondent's probationary sentence that required him to successfully complete a Sexual Offender Program meant that he would have to admit guilt, which would have been contradictory to the testimony he gave under oath at trial. It also meant that he could possibly be charged with perjury for lying under oath. According to Montana Code Annotated Section 45-7-201, "a person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made, when the statement is material."

In *Blair v. United States,* 250 U.S. 273 (1919), the United States Supreme Court stated that, "among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or

before grand juries or agencies." However, the Court went on to state that, "the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty. The most important of which is the Fifth Amendment privilege against compulsory self-incrimination." The United States Supreme Court in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), made it clear that the right against self-incrimination reflects our fundamental values and aspirations, and marks an important advance in the development of our liberty. The Court, in *Murphy, supra*, also stated that this right can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.

In analyzing the policies of the right against self-incrimination, the United States Supreme Court in *Ullmann v. United States*, 350 U.S. 422, 426 (1964), stated that, "The privilege against self-incrimination registers an important advance in the development of our liberty . . . 'one of the great landmarks in man's struggle to make himself civilized.' " The fact that the district court demanded that Respondent Imlay give up such an important right, demonstrates the lack of the court to understand that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

CONCLUSION

The probationary sentence imposed on Respondent Imlay by the district court exhibits all three qualities that the court in *Richard Roe v. United States, supra*, stated are necessary to trigger the Fifth Amendment right against

self-incrimination. By ordering, as a condition of probation, that Respondent Imlay successfully complete a Sexual Offender Program, he would be required to admit guilt. Such an admission would have been compelled and he would be required to give up his right to post-conviction relief, in addition to risking a possible charge of perjury. This is the very dilemma that the Fifth Amendment is intended to guard against.

The Respondent therefore respectfully requests that the decision of the Montana Supreme Court be upheld.

Respectfully submitted,

BILLY B. MILLER
Counsel of Record
600 Central Plaza, Ste. 300
Great Falls, MT. 59401

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ Of Certiorari
To The Montana Supreme Court

REPLY BRIEF FOR PETITIONER

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE POSSIBILITY OF NEWLY DISCOVERED EVIDENCE IS TOO REMOTE AND SPECULATIVE TO WARRANT APPLICATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION . 2

II. THERE IS NO REALISTIC THREAT OF A PERJURY PROSECUTION 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Allen v. Illinois, 478 U.S. 364 (1986).....6, 8

Brown v. Walker, 161 U.S. 591 (1896).....2, 6

Chaffin v. Stynchcombe, 412 U.S. 17 (1973).....3

Gardner v. Broderick, 392 U.S. 273 (1968).....8

Garner v. United States, 424 U.S. 648 (1976).....8

Griffith v. Kentucky, 479 U.S. 314 (1987).....3

Hoffman v. United States, 341 U.S. 479 (1951).....7

Mackey v. United States, 401 U.S. 667 (1971).....4

Mason v. United States, 244 U.S. 362 (1917).....7

Minnesota v. Murphy, 465 U.S. 420 (1984).....8

State v. Perry, 759 P.2d 268 (Mont. 1988).....3

State v. Thiel, 768 P.2d 343 (Mont. 1989).....2, 6, 7

Teague v. Lane, 489 U.S. 288 (1989).....4

Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).....5

United States v. Apfelbaum, 445 U.S. 115 (1980)....1, 3

United States v. Henry, 883 F.2d 1010 (11th Cir. 1989).....7

CONSTITUTIONAL PROVISION:

United States Constitution
Amendment V..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Montana Code Annotated
§ 46-18-201 (1991) 8

§ 46-21-101 to -203 (1991)..... 4

Montana Rules of Civil Procedure
Rule 60(b).....4, 5

SUMMARY OF ARGUMENT

The respondent's brief fails to address the controlling considerations presented by the petitioner and the amici curiae. Foremost among the omissions is a discussion of the underlying purposes of the Fifth Amendment privilege and its application to convicted defendants who, through a suspended prison sentence, have been extended the benefit of therapy in a community-based setting. While the respondent's brief specifically reviews the issue of whether Imlay has a vestigial Fifth Amendment right in postconviction proceedings, it fails to mention the fact that his statements were solicited solely for therapy purposes. It further fails to address an issue which the Montana Supreme Court considered crucial to its decision: whether revocation of Imlay's probation was a penalty imposed for the valid exercise of the privilege. The respondent's brief thus serves only to emphasize the irony of the situation created by the Montana Supreme Court's decision, in which a convicted defendant is placed in the awkward position of arguing that the Fifth Amendment privilege mandates incarceration rather than probation and meaningful treatment.

Respondent addresses only two narrow and highly speculative considerations: the possibility of newly discovered evidence and the threat of perjury. Neither the remote prospect of newly discovered evidence nor the unrealistic threat of a future perjury prosecution warrants the extension of the Fifth Amendment privilege against self-incrimination to statements made in therapy that concern only the crime for which a defendant has been convicted. The Fifth Amendment privilege does not protect speculative prospective acts. *United States v.*

Apfelbaum, 445 U.S. 115, 129 (1980). The privilege serves to protect against future incrimination that is "real and appreciable." *Brown v. Walker*, 161 U.S. 591, 600 (1896). The prospect of newly discovered evidence is much too speculative to form the basis for Fifth Amendment protections. The threat of perjury is equally chimerical because, under Montana law, statements made in therapy may not be used as the basis for a future criminal prosecution. *State v. Thiel*, 768 P.2d 343 (Mont. 1989).

The respondent's brief continues a fiction created by the Montana Supreme Court that Imlay denied the crime because he did not want to impair any postconviction relief or out of fear of a perjury prosecution. There is no indication in the record that his denial was based upon Fifth Amendment concerns or the fear of future repercussions if he admitted his guilt in therapy. The arguments in the respondent's brief concerning newly discovered evidence and the threat of perjury are therefore illusory and misleading.

ARGUMENT

I. THE POSSIBILITY OF NEWLY DISCOVERED EVIDENCE IS TOO REMOTE AND SPECULATIVE TO WARRANT APPLICATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Respondent states that he is waiting for the victim to recant and that for this reason the Fifth Amendment protects any statements he might make in therapy concerning the crime for which he has already been convicted and sentenced. There is no basis whatsoever to

support respondent's anticipation of newly discovered evidence. The protections afforded by the privilege against self-incrimination do not extend to such wishful conjecture and speculation.

The remote possibility of a recantation based upon wishful thinking cannot serve to hinder the criminal justice process or to trigger Fifth Amendment protections. *United States v. Apfelbaum, supra* (prospective acts will ordinarily involve only speculative and insubstantial risks of incrimination).[1] In *Chaffin v. Stynchcombe*, 412 U.S. 17, 34-35 (1973), the Court noted that speculative prospects of a harsher sentence after successful appeal do not create a realistic threat to the free choice of whether to pursue the appeal. Equally important, the theoretical possibility of newly discovered evidence does not create a constitutionally coercive threat here, since the respondent retained the freedom to decide whether to participate in postconviction therapy.

Respondent's conviction is deemed final. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). It is contrary to the concept of finality to preclude the State from proceeding with appropriate treatment because, at some indeterminate point, a defendant may want to collaterally attack his conviction. The concept of finality demands that once

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[1] Even if the victim recanted, whether the recantation could be the basis for postconviction relief is in itself highly speculative. In *State v. Perry*, 759 P.2d 268, 274-75 (Mont. 1988), the Montana Supreme Court rejected recantation testimony as the basis for postconviction relief, noting the limited value of such testimony and how it is traditionally viewed with great suspicion.

a conviction is final, the State may proceed with the therapy and rehabilitation appropriate for an individual defendant.[2] As Justice Harlan stated in discussing the importance of finality of criminal litigation:

> Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring), quoted with approval in *Teague v. Lane*, 489 U.S. 288, 309 (1989). A defendant must not be sentenced tentatively. It is for the defendant's benefit, as well as the State's, to begin meaningful rehabilitative efforts as soon as possible.

Respondent suggests that under Mont. R. Civ. P. 60(b), his conviction could be set aside on the basis of newly discovered evidence. Resp. Br. at 8. Rule 60(b) would provide no relief to respondent. Any postconviction relief must be based upon Mont. Code Ann.

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[2] As indicated in the petitioner's opening brief, the only instances in which states have given a sympathetic ear to an allegation of viable Fifth Amendment rights in a postconviction setting is where appeal as of right is still pending or available. *See* Pet. Br. at 18, n.18. Respondent has never appealed his conviction and is time-barred from doing so.

§§ 46-21-101 to -203 (1991), the state postconviction statutes. As discussed in petitioner's opening brief, the privilege against self-incrimination with respect to the crime for which a defendant has already been convicted has little, if any, viability in the postconviction arena.[3] *See* Pet. Br. at 16-20.

II. THERE IS NO REALISTIC THREAT OF A PERJURY PROSECUTION.

Imlay has never asserted, and the record does not reflect, that his denial of the crime in therapy was motivated by his fear of a perjury prosecution. The threat of a perjury prosecution is a misleading fiction, unsupported by the record, that arose from the Montana Supreme Court's reliance upon the case of *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). In *Thomas*, the sentencing court threatened the defendant with a longer sentence unless he confessed to the court that he was guilty of the crime of which he had been convicted. Imlay's situation was much different from that of a defendant standing in open court. Imlay's statements were requested in a treatment setting, and were required solely for therapy and

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[3] Even if Rule 60(b) were applicable generally to a criminal postconviction proceeding, any newly discovered evidence, at this point, would be time-barred. Rule 60(b) provides that a motion based upon newly discovered evidence must be made not more than 60 days after notice of entry of judgment. Further, the prospect of newly discovered evidence does not serve to suspend imposition of appropriate treatment for a convicted defendant. Rule 60(b) provides: "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

rehabilitation purposes. Imlay was not placed inquisitorially before a sentencing judge and told to confess or else go to prison.

The sentencing court suspended Imlay's prison sentence through an act of leniency by the sentencing court, in the hope that he would be amenable to therapy and take meaningful steps toward rehabilitation. Thus, the discussion of the Fifth Amendment privilege in *Allen v. Illinois*, 478 U.S. 364 (1986), is most pertinent. *See* Pet. Br. at 15-16.

Moreover, under Montana law, statements made in therapy may not be used in any future criminal prosecution where the charges are based upon the statements themselves. *State v. Thiel, supra*. Because Imlay's statements concerning the crime for which he had already been convicted could not be used as proof of perjury, he was never under a realistic threat of future criminal prosecution for the crime. *See also* Pet. Br. at 21, n.16.

In *Brown v. Walker, supra*, the Court enunciated the controlling standard for application of the Fifth Amendment privilege against self-incrimination. The danger against which the privilege provides a shield must be

> real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

Id. See also Hoffman v. United States, 341 U.S. 479, 486-87 (1951) ("To sustain the privilege [against self- incrimination], it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure might result"). The Fifth Amendment privilege is confined to instances where an individual has reasonable cause to apprehend danger from a direct answer. *Mason v. United States*, 244 U.S. 362, 365 (1917). Not only is there no indication in the record that the threat of perjury influenced Imlay's conduct in denying the crime during therapy, but, under *Thiel*, the State could not prosecute him for perjury for any statements made in the course of therapy. A reasonable person would not have seen perjury as a threat in this setting. Thus, the threat of perjury is wholly unrealistic and insubstantial.

Even absent the holding in *Thiel*, the idea that the State would prosecute Imlay for complying with a probationary condition and successfully taking the first step toward rehabilitation is irrational. The State's interest, here, lies in furthering a defendant's rehabilitation and his reintegration into the community, without placing the community at risk. This is the interest that was pursued in the original sentencing when the condition requiring sex offender treatment was initially imposed. To use the threat of perjury to preclude a possible benefit to a defendant is illogical and certainly not an intended result of the Fifth Amendment privilege. *See United States v. Henry*, 883 F.2d 1010 (11th Cir. 1989) (the possibility of leniency cannot be equated with impermissible punishment).

Imlay has raised nothing in his response brief to indicate that a real and substantial threat to his privilege against self-incrimination exists in this case. Neither the speculation of newly discovered evidence nor the unrealistic threat of perjury justifies application of the Fifth Amendment protections to Imlay's denial of the sexual assault in postconviction therapy.

The Fifth Amendment privilege against self-incrimination, despite its grave importance, applies to only a narrow scope of inquiries. *Garner v. United States*, 424 U.S. 648, 655 (1976). It does not apply when the government seeks answers to questions in a noncriminal investigation. *Id.*, citing *Gardner v. Broderick*, 392 U.S. 273, 278 (1968). It does not apply when the government seeks a response for purely rehabilitative purposes. *Allen v. Illinois, supra.* It does not apply when the response would not realistically expose a probationer to future criminal prosecution. *Minnesota v. Murphy*, 465 U.S. 420, 426, 435 n.7 (1984). It therefore cannot apply to a probationary condition in which statements are sought for noncriminal, therapeutic purposes, and where the statements could not realistically be used in a future criminal prosecution.

Imlay had no initial right to his conditional liberty. Mont. Code Ann. § 46-18-201. He was not "forced" in any way to accept probation. Probation was granted as a form of leniency, in the hope that Imlay would be reintegrated into society, without placing society at risk.[4] Sex offender

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[4] In his brief, respondent claims that the sentencing court was aware that Imlay's denial would make him unsuitable for

(Continued on following page)

treatment was designed to promote such rehabilitation and reintegration. Once outpatient therapy failed, the sentencing court's duty was to reevaluate Imlay's rehabilitation potential, as well as his potential risk to society, and redetermine his probationary status. When Imlay's continued denial showed that he could not take the first step toward meaningful rehabilitation, the State's supervision changed to accommodate both Imlay's need for inpatient therapy and the desire to protect society. There was therefore no "penalty" for Imlay's denial of the

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(Continued from previous page)

treatment when the condition requiring sex offender treatment was initially imposed. Contrary to this assertion, the record shows that the sentencing court was not aware at the time the condition was initially imposed that Imlay would not be amenable to treatment. *See* Judgment of Conviction and Re-Sentencing in which the sentencing court states, "Had the Court known at the time of the original sentence herein that this defendant would not be accepted in a sexual offender treatment program, the Court would not have imposed a suspended sentence but rather would have imposed a prison sentence." (J.A. 41.)

Also contrary to respondent's assertions, the presentence report does not indicate that Imlay's denial would preclude him from treatment. The probation officer acknowledged that denial of the offense indicates Imlay's possible danger to the community because of the possibility of reoffending. (Presentence Report, NR #57 at 6.) Because of Imlay's denial, the probation officer recommended incarceration and enrollment in the sex offender treatment program at the Montana State Prison. Nonetheless, the probation officer recommended that, in the event the court chose to suspend Imlay's sentence, Imlay undergo a sex therapy program in the community. *Id.*

crime.[5] Imlay was incarcerated not for invocation of his Fifth Amendment rights, but because he had been found guilty of sexually assaulting a seven-year-old girl and was unamenable to treatment.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

June 1992

[5] The Montana Supreme Court reasoned that Imlay's Fifth Amendment right was infringed because he suffered the "penalty" of incarceration when his probation was revoked. Pet. App. 14a. As discussed in petitioner's opening brief, revocation of probation for failure to comply with a probationary condition is not a "penalty" that triggers Fifth Amendment protections. Pet. Br. at 23-32.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF MONTANA, PETITIONER

v.

DONALD GLENN IMLAY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a convicted criminal defendant's privilege against compulsory self-incrimination is violated when his probation is revoked as a result of his refusal to accept responsibility for his crime.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	4
Argument	7
Requiring defendants to accept responsibility for their criminal conduct in order to qualify for lenient sentencing treatment does not constitute compulsion within the meaning of the privilege against compulsory self-incrimination	7
A. The Constitution does not require government to make exercise of the Fifth Amendment privilege cost-free	8
B. The history and purposes of the privilege against compulsory self-incrimination do not prohibit extending leniency to criminal defendants who accept responsibility for their conduct	10
C. Extension of leniency to criminal defendants who accept responsibility for their criminal conduct does not constitute a "penalty" imposed on criminal defendants who choose to exercise their right to remain silent	17
D. Government may withhold discretionary benefits from individuals who fail to prove they are entitled to those benefits even if their failure is attributable to the assertion of their Fifth Amendment privilege	22
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Baxter v. *Palmigiano*, 425 U.S. 308 (1976)	16
Bordenkircher v. *Hayes*, 434 U.S. 357 (1978)	6, 17, 19, 21, 22
Brady v. *United States*, 397 U.S. 742 (1970)	6, 15, 17, 19

Cases—Continued: Page

Brooks v. *Tennessee*, 406 U.S. 605 (1972) 8
California v. *Byers*, 402 U.S. 424 (1971) 9, 10
Chaffin v. *Stynchcombe*, 412 U.S. 17 (1973) 21
Corbitt v. *New Jersey*, 439 U.S. 212 (1978) 6, 17, 18, 19, 27
Couch v. *United States*, 409 U.S. 322 (1973) 7, 11, 13
Counselman v. *Hitchcock*, 142 U.S. 547 (1892) 5, 11
Fisher v. *United States*, 425 U.S. 391 (1976) 7, 13
Gardner v. *Broderick*, 392 U.S. 273 (1968) 8, 20, 21
Garrity v. *New Jersey*, 385 U.S. 493 (1967) 8, 20, 21, 25
Gollaher v. *United States*, 419 F.2d 520 (9th Cir.), cert. denied, 396 U.S. 960 (1969) 15
Griffin v. *California*, 380 U.S. 609 (1965) 4, 8, 9, 11, 16
Jenkins v. *Anderson*, 447 U.S. 231 (1980) 5, 9, 15
Kimm v. *Rosenberg*, 363 U.S. 405 (1960) 7, 24, 25
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977) ..8, 20, 21
Lefkowitz v. *Turley*, 414 U.S. 70 (1973) 8, 20, 21, 25
Malloy v. *Hogan*, 378 U.S. 1 (1964) 5, 13
McGautha v. *California*, 402 U.S. 183 (1971) 5, 9, 10
Michigan v. *Tucker*, 417 U.S. 433 (1974) 10, 15
Minnesota v. *Murphy*, 465 U.S. 420 (1984) 21
Minnick v. *Mississippi*, 111 S. Ct. 486 (1990) 15
Murphy v. *Waterfront Comm'n*, 378 U.S. 52 (1964) 5, 14
New York v. *Burger*, 482 U.S. 691 (1987) 14
Orloff v. *Willoughby*, 345 U.S. 83 (1953) 7, 24
Roberts v. *United States*, 445 U.S. 552 (1980) 15
Schmerber v. *California*, 384 U.S. 757 (1966) 13
Skinner v. *Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) 14
Slochower v. *Board of Education*, 350 U.S. 551 (1956) 8
South Dakota v. *Neville*, 459 U.S. 553 (1983) 10
Spevack v. *Klein*, 385 U.S. 511 (1967) 4, 8, 9, 21, 25
State v. *Gleason*, 576 A.2d 1246 (Vt. 1990) 19
Tehan v. *United States ex rel. Shott*, 382 U.S. 406 (1966) 13
Uniformed Sanitation Men Ass'n v. *Commissioner of Sanitation*, 392 U.S. 280 (1968) 8, 16, 20, 21

Cases—Continued: Page

United States v. *Frierson*, 945 F.2d 650 (3d Cir. 1991), cert. denied, No. 91-6849 (Mar. 23, 1992) .. 2
United States v. *Gordon*, 895 F.2d 932 (4th Cir.), cert. denied, 111 S. Ct. 131 (1990) 2
United States v. *Jackson*, 390 U.S. 570 (1968) 8, 9
United States v. *Monia*, 317 U.S. 424 (1943) 7
United States v. *Mourning*, 914 F.2d 699 (5th Cir. 1990) 2, 23
United States v. *Ignancio Munio*, 909 F.2d 436 (11th Cir. 1990), cert. denied, 111 S. Ct. 1393 (1991) 2
United States v. *Oliveras*, 905 F.2d 623 (2d Cir. 1990) 2
United States v. *Perez-Franco*, 873 F.2d 455 (1st Cir. 1989) 2
United States v. *Piper*, 918 F.2d 839 (9th Cir. 1990) (per curiam) 2
United States v. *Rogers*, 921 F.2d 975 (10th Cir.), cert. denied, 111 S. Ct. 113 (1990) 2
United States v. *Rylander*, 460 U.S. 752 (1983) 7, 25
United States v. *Washington*, 431 U.S. 181 (1977) .. 7, 15
Williams v. *Florida*, 399 U.S. 78 (1970) 9

Constitution, statutes and rule:

U.S. Const.:

Amend. IV 14
Amend. V ..... *passim*

Mont. Code Ann. (1989):

§ 45-5-502(3) 2
§ 46-18-201(1) 22

Sentencing Guidelines:

§ 3E1.1 2
§ 3E1.1, Application Note 1(c) 19
§ 3E1.1(a) 2

Miscellaneous:

8 *Wigmore on Evidence* (McNaughton rev. ed. 1961) 13

Miscellaneous—Continued: Page

57 Fed. Reg. (1992):

p. 90 2
pp. 103-104 2

Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671 (1968) 12, 13

L. Levy, *History and Judicial History: The Case of the Fifth Amendment*, in *Constitutional Opinions: Aspects of the Bill of Rights* (L. Levy ed. 1986) 5, 12

L. Levy, *Origins of the Fifth Amendment* (1968) 11

Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949) 11

R. McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193 13

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-687

STATE OF MONTANA, PETITIONER

v.

DONALD GLENN IMLAY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the Fifth Amendment permits sentencing courts to revoke probation when a convicted criminal defendant's refusal to admit his guilt prevents him from complying with a condition of his probation. More generally, the case involves the validity of sentencing determinations made in part on the basis of a convicted defendant's willingness to accept responsibility for his criminal conduct. The United States has a strong interest in establishing the constitutionality of such sentencing

determinations. Pursuant to United States Sentencing Guidelines § 3E1.1(a), a defendant convicted of a federal crime is granted a two-level reduction in his offense level if he "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." [1] Some courts of appeals have suggested that Section 3E1.1 would run afoul of the constitutional privilege against compulsory self-incrimination if construed to require acceptance of responsibility for crimes other than the offense of conviction,[2] while others have rejected that contention.[3] The Court's decision in this case may provide guidance to the lower courts in determining the validity and proper scope of Section 3E1.1.

STATEMENT

1. Respondent Donald Glenn Imlay was charged with felonious sexual assault on a seven-year-old girl, in violation of Mont. Code Ann. § 45-5-502(3) (1989).

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[1] The Sentencing Commission has published for comment a proposed amendment to Guidelines § 3E1.1 that would provide a one-level reduction in offense level to defendants who admit their culpability at any time, including after trial. See 57 Fed. Reg. 90, 103-104 (1992).

[2] See, *e.g.*, *United States* v. *Oliveras*, 905 F.2d 623, 626-628 (2d Cir. 1990); *United States* v. *Perez-Franco*, 873 F.2d 455, 462-463 (1st Cir. 1989); cf. *United States* v. *Piper*, 918 F.2d 839, 840-841 (9th Cir. 1990) (per curiam); *United States* v. *Frierson*, 945 F.2d 650 (3d Cir. 1991), cert. denied, No. 91-6849 (Mar. 23, 1992).

[3] See, *e.g.*, *United States* v. *Rogers*, 921 F.2d 975, 982-983 (10th Cir.), cert. denied, 111 S. Ct. 113 (1990); *United States* v. *Mourning*, 914 F.2d 699, 706-707 (5th Cir. 1990); *United States* v. *Ignancio Munio*, 909 F.2d 436, 439-440 n.4 (11th Cir. 1990); *United States* v. *Gordon*, 895 F.2d 932, 936-937 (4th Cir. 1990).

Respondent testified in his defense at trial and denied any wrongdoing, but he was convicted. Pet. 3; Pet. App. 17a.

The trial judge sentenced respondent to five years in prison. Finding that respondent's offense was an isolated incident and that respondent was suffering from medical problems, the judge suspended the prison sentence and placed respondent on supervised probation. The probation was conditioned on respondent's enrollment in and successful completion of a sexual therapy and counseling program. Pet. App. 18a-20a.

Respondent attempted to comply with the requirement that he obtain therapy, but he was unable to qualify for any outpatient sexual offender treatment program offered in Montana because he refused to acknowledge that he had committed the crime for which he had been convicted. Pet. App. 23a-24a. On the prosecution's motion to revoke probation, the court concluded that respondent "has violated the condition of his suspended sentence by not enrolling (not being amenable to treatment and hence, not acceptable into an out-patient treatment program) in a sex offender treatment program." *Id.* at 24a. The court noted that the requirement that respondent obtain treatment was "the most important condition on [his] suspended sentence." *Ibid.* Because the court found that "the only viable alternative is an in-patient program," and that the only in-patient sex offender treatment program in Montana was located in the Montana State Prison, *ibid.*, the court revoked respondent's probation and ordered him to serve his five-year prison sentence, *id.* at 24a-25a.

2. The Montana Supreme Court reversed. Pet. App. 1a-15a. The court framed the issue before it in

the following terms: "Can a criminal defendant, as a condition of a suspended sentence, be compelled to admit that he is guilty of the crime of which he has been accused and convicted?" *Id.* at 2a. Noting a difference of opinion on that issue in its own precedents and among the federal courts of appeals, *id.* at 9a-14a, the court concluded that the better rule was to "prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." *Id.* at 15a. The court reasoned that respondent was "being subjected to a penalty that he would not otherwise be subjected to if he would simply admit his guilt." *Id.* at 14a. According to the court, respondent still had the right to challenge his conviction by collateral attack, and that right "would be rendered meaningless" if he were "compelled to admit guilt as a condition to his continued freedom." *Ibid.* Moreover, the court observed that respondent would have been forced to incriminate himself on the crime of perjury in order to qualify for treatment, because he had testified in his defense at trial. *Ibid.*

SUMMARY OF ARGUMENT

A. Not all burdens on a criminal defendant's privilege against compulsory self-incrimination constitute impermissible "compulsion" within the meaning of the Fifth Amendment. Some of this Court's cases suggest that the Amendment forbids government to make assertion of the privilege "costly," see, *e.g.*, *Griffin* v. *California*, 380 U.S. 609, 614 (1965); *Spevack* v. *Klein*, 385 U.S. 511, 515 (1967) (plurality opinion), but the Court has made clear that criminal defendants may, in appropriate circumstances, be required to choose between their right to remain

silent and another right or benefit. *Jenkins* v. *Anderson*, 447 U.S. 231 (1980); *McGautha* v. *California*, 402 U.S. 183 (1971).

B. The question whether the Fifth Amendment bars a particular governmental burden on a defendant's assertion of the privilege against compulsory self-incrimination must be answered by reference to the history and purposes of the privilege and the countervailing governmental interests justifying the burden. As a historical matter, the privilege protected individuals from government efforts to force them to assist in the investigation and prosecution of criminal charges against them, but did not forbid the denial of government benefits to those who chose to remain silent. See *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892); L. Levy, *History and Judicial History: The Case of the Fifth Amendment*, in *Constitutional Opinions: Aspects of the Bill of Rights* 208 (L. Levy ed. 1986).

The central purpose of the privilege is to ensure that government "may not by coercion prove a charge against an accused out of his own mouth," *Malloy* v. *Hogan*, 378 U.S. 1, 7-8 (1964). The practice of denying lenient treatment to convicted criminal defendants who refuse to accept responsibility for their conduct does not offend that central purpose, because it does not force defendants to confess their guilt or present them with the "cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

The governmental interests justifying the challenged practice are legitimate and substantial. It is entirely appropriate to reward a convicted defendant with leniency when he admits his guilt, because the act of acceptance of responsibility demonstrates "that

he is ready and willing * * * to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady* v. *United States*, 397 U.S. 742, 753 (1970). Moreover, the justification for encouraging acceptance of responsibility is unrelated to any criminal investigative or prosecutive purpose.

C. Extension of leniency to criminal defendants who accept responsibility for their criminal conduct does not constitute a "penalty" imposed on those defendants who choose to remain silent. The sentencing practice at issue in this case is closely analogous to the practice of plea bargaining, in which the State encourages guilty pleas by promising lenient treatment at sentencing. This Court has repeatedly upheld the validity of plea bargaining despite the burden it imposes on the exercise of the privilege, see, *e.g.*, *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *Brady* v. *United States*, 397 U.S. 742 (1970), and there is no basis for reaching a different result in the circumstances of this case.

D. Respondent bore the burden of demonstrating his qualification for continued enjoyment of probation, and he failed to satisfy that burden when he chose to remain silent instead of accepting responsibility for his crime. The revocation of respondent's probation was not, therefore, a punishment for his assertion of the privilege but rather a legitimate consequence of his failure to demonstrate his qualification for further lenient treatment. The Fifth Amendment is not violated when an individual's claim to a government benefit is rejected because his assertion of the privilege prevents him from establishing his

entitlement to that benefit. See *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960) (per curiam); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); see also *United States* v. *Rylander*, 460 U.S. 752 (1983).

ARGUMENT

REQUIRING DEFENDANTS TO ACCEPT RESPONSIBILITY FOR THEIR CRIMINAL CONDUCT IN ORDER TO QUALIFY FOR LENIENT SENTENCING TREATMENT DOES NOT CONSTITUTE COMPULSION WITHIN THE MEANING OF THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." As this Court has observed, "[t]he Amendment speaks of compulsion," *United States* v. *Monia*, 317 U.S. 424, 427 (1943), and thus "[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher* v. *United States*, 425 U.S. 391, 397 (1976). See *United States* v. *Washington*, 431 U.S. 181, 187-188 (1977) ("The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions. * * * The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony."); *Couch* v. *United States*, 409 U.S. 322, 328, 336 (1973). The threshold question, therefore, is whether respondent has been subjected to constitutionally cognizable compulsion aimed at forcing him to waive his Fifth Amendment rights.

A. The Constitution Does Not Require Government To Make Exercise Of The Fifth Amendment Privilege Cost-Free

This Court has held that some government-imposed burdens on the exercise of a defendant's privilege against compelled self-incrimination are sufficiently severe, in light of the policies served by the privilege and the competing governmental interests at stake, to constitute compulsion within the meaning of the Fifth Amendment. Thus, in a line of cases beginning with *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and extending through *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977), the Court established and reaffirmed the principle that "answers elicited upon the threat of the loss of employment are compelled" within the meaning of the Fifth Amendment. *Lefkowitz* v. *Turley*, 414 U.S. 70, 85 (1973).[4] Likewise, in *Griffin* v. *California*, 380 U.S. 609 (1965), the Court concluded that "comment on [a criminal defendant's] refusal to testify * * * is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614.[5] See also *Brooks* v. *Tennessee*, 406 U.S. 605 (1972) (invalidating rule requiring defendant to testify as first defense witness at trial or not at all); *United States* v. *Jackson*, 390 U.S. 570 (1968) (invalidating jury-imposed death penalty

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[4] See *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Spevack* v. *Klein*, 385 U.S. 511 (1967); see also *Slochower* v. *Board of Education*, 350 U.S. 551 (1956).

[5] Justice Stewart, joined by Justice White, dissented in *Griffin*, stating: "I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel." 380 U.S. at 620.

provision of Federal Kidnaping Act because it unduly pressured defendants to plead guilty in order to avoid possibility of death sentence).

There is language in some of these "penalty" cases that suggests that any government action "which makes assertion of the Fifth Amendment privilege 'costly' " constitutes compulsion within the meaning of the Fifth Amendment. *Spevack* v. *Klein*, 385 U.S. 511, 515 (1967) (plurality opinion); see, *e.g.*, *Griffin* v. *California*, 380 U.S. at 614. The Court, however, has not applied that language rigidly in cases involving other burdens on the exercise of the Fifth Amendment privilege. To the contrary, the Court has made clear that the criminal justice system may lawfully create disincentives for the exercise of the Fifth Amendment privilege. For example, a defendant's pre-arrest decision to exercise his Fifth Amendment privilege rather than go to the police may be used to impeach his testimony at trial, despite the risk that the assertion of the privilege will be discouraged as a result. *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). Similarly, a defendant may be compelled to disclose to the government the substance of his alibi defense prior to trial or be barred from presenting the defense, despite the claim that such a rule forces the defendant to provide information that could assist the State in convicting him. *Williams* v. *Florida*, 399 U.S. 78 (1970). And a defendant's exercise of his right to remain silent at trial may be conditioned on his waiver of the opportunity to testify on matters affecting his sentence. See *McGautha* v. *California*, 402 U.S. 183 (1971).

In short, "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' " *Jenkins* v. *Anderson*, 447 U.S. at 236 (quoting *Chaffin* v. *Stynchcombe*, 412

U.S. 17, 30 (1973)). "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha* v. *California*, 402 U.S. at 213 (citation omitted). See also *South Dakota* v. *Neville*, 459 U.S. 553, 564 (1983).

B. The History And Purposes Of The Privilege Against Compulsory Self-Incrimination Do Not Prohibit Extending Leniency To Criminal Defendants Who Accept Responsibility For Their Conduct

The question whether a government-imposed burden on the Fifth Amendment privilege rises to the level of constitutionally proscribed compulsion cannot be answered by reference to the simple assertion that criminal defendants may not be penalized for exercising their Fifth Amendment rights. Rather, the inquiry requires consideration of the extent to which a particular burden implicates the interests protected by the Fifth Amendment privilege. As Justice Harlan said for the Court in *McGautha* v. *California*, "[t]he threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." 402 U.S. at 213. In making that determination, the Court has looked to "the historical origins of the privilege, particularly the evils at which it was to strike." *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974).

1. An examination of the historical underpinnings and purposes of the Fifth Amendment privilege provides scant support for an interpretation that would forbid courts to require acceptance of responsibility as a condition of lenient sentencing treatment. "His-

torically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth. The Court has thought the privilege necessary to prevent any 'recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'" *Couch* v. *United States*, 409 U.S. 322, 327 (1973).[6] Thus, the focus of the privilege has always been on government actions aimed at forcing individuals to assist the government in gathering incriminating evidence for use against them. See *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892) ("The object was to insure that a person should not be compelled,

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[6] As Justice Stewart observed in dissent in *Griffin* v. *California*, "the procedures which historically gave rise to the Fifth Amendment guarantee" were of a different order entirely from indirect burdens on the privilege of the type at issue in this case:

> When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

380 U.S. at 620 (Stewart, J., joined by White, J., dissenting). By the Eighteenth Century, the privilege had expanded beyond its roots, but its scope was still quite narrow. See L. Levy, *Origins of the Fifth Amendment* 325 (1968) ("The principle * * * was restrict[ed] narrowly to prohibition of the oath [*ex officio*] and to the right of the suspect to refuse to answer."); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 12 (1949).

when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.").

There is no historical support for an interpretation of the privilege that would prevent sentencing courts from granting leniency to already-convicted defendants who have indicated their willingness to accept responsibility for their crimes and get on with their lives. Indeed, the commentators appear generally in agreement that the entire line of "penalty" cases stands on shaky historical ground. As Professor Leonard W. Levy, the foremost modern historian of the Fifth Amendment, has written:

> Decisions like *Slochower v. Board of Education* (1956) and *Garrity v. New Jersey* (1967) which protect against penalizing the invocation of the right or chilling its use, draw no clear support from the past. Indeed, the decision in *Griffin v. California* (1965) which prohibited comment on the failure of a criminal defendant to testify on [the] ground that such comment "is a remnant of the inquisitorial system" is historically farfetched.

L. Levy, *History and Judicial History: The Case of the Fifth Amendment*, in *Constitutional Opinions: Aspects of the Bill of Rights* 193, 208 (L. Levy ed. 1986). See also Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 707 (1968) ("Nothing in the historical development of the privilege suggests that threatened loss of employment was the kind of compulsion against which the amendment aimed to protect; the 'compulsions' of concern to the framers were torture, bullying and imprisonment for contempt.").

2. For similar reasons, the purposes of the privilege do not require invalidation of the sentencing

practices at issue in this case. The Court and commentators have emphasized that the principal purpose served by the Fifth Amendment privilege is to "proscribe[] state intrusion to extract self-condemnation," *Couch*, 409 U.S. at 327; that is, the privilege is designed to ensure that the government "may not by coercion prove a charge against an accused out of his own mouth." *Malloy* v. *Hogan*, 378 U.S. 1, 7-8 (1964). See also *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 414-416 & n.12 (1966); Friendly, *supra*, 37 U. Cinn. L. Rev. at 686-695; R. McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193, 206-214; 8 *Wigmore on Evidence* § 2251 (McNaughton rev. ed. 1961). The Court has cautioned, however, that the privilege "has never been given the full scope which the values it helps to protect suggest." *Schmerber* v. *California*, 384 U.S. 757, 762 (1966). See also *Fisher* v. *United States*, 425 U.S. 391, 399-401 (1976). Thus, as the Court observed in *Couch*, "[i]t is important, in applying constitutional principles, to interpret them in light of the fundamental interests in personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws." 409 U.S. at 336.

Nothing about the practice of extending lenient treatment to criminal defendants who accept responsibility for their criminal conduct conflicts with the central purposes of the privilege. There is no suggestion in this case that respondent was subjected to physical or mental abuse or mistreatment in an effort to obtain his "confession," or that the requirement that he admit his wrongs to obtain treatment was a subterfuge for obtaining incriminating evidence as

part of an ongoing criminal investigation preparatory to a future prosecution.[7] Nor was respondent presented with the "cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

To be sure, respondent's failure to accept responsibility for his crime did eventually lead to the revocation of his probation. But his five-year prison sentence was imposed because he sexually molested a seven-year-old girl, not because he refused to admit his guilt. Respondent was not ordered to confess, or required to make incriminating statements under oath, or held in contempt, or sentenced to an additional prison term because of his silence; instead, he simply chose not to comply with a condition precedent to his continued enjoyment of probationary status and was therefore denied that status.[8]

3. The importance and nature of the government interests at stake also militate against any finding of

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[7] Cf. *Skinner* v. *Railway Labor Executives Ass'n*, 489 U.S. 602, 620-621 & n.5 (1989) (upholding employee drug testing program against Fourth Amendment challenge, in part because there was no evidence of intent to use the test results for criminal prosecutions or that the purported goals of testing were pretexts for criminal investigation); *New York* v. *Burger*, 482 U.S. 691, 716-717 n.27 (1987) (rejecting Fourth Amendment challenge to administrative search, in part because the State "had proper regulatory purposes for enacting the administrative scheme and was not using it as a 'pretext' to enable law enforcement authorities to gather evidence of penal law violations.").

[8] Nor is any concern for the protection of innocent persons implicated here: respondent had already been found guilty of felony sexual assault by a jury, and there was no effort to obtain information from him beyond that relevant to the transaction giving rise to his criminal conviction.

a Fifth Amendment violation here. See *Jenkins* v. *Anderson*, 447 U.S. at 238 ("In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice."). There can be no question that the practice of extending lenient treatment to criminal defendants who accept responsibility for their crimes is a legitimate and commendable one. This Court has recognized that cooperation with law enforcement authorities is laudable and may be taken into account at sentencing. *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980). Similarly, a defendant's willingness to accept responsibility for his criminal conduct demonstrates "that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady* v. *United States*, 397 U.S. 742, 753 (1970); see also *Gollaher* v. *United States*, 419 F.2d 520, 530 (9th Cir.), cert. denied, 396 U.S. 960 (1969) ("[T]he first step toward rehabilitation of an offender is the offender's recognition that he was at fault."). "Not only for society, but for the wrongdoer himself, 'admissio[n] of guilt . . ., if not coerced, [is] inherently desirable,' *United States* v. *Washington*, 431 U.S. 181, 187 (1977), because it advances the goals of both 'justice *and* rehabilitation.' *Michigan* v. *Tucker*, 417 U.S., at 448, n. 23 (emphasis added)." *Minnick* v. *Mississippi*, 111 S. Ct. 486, 498 (1990) (Scalia, J., dissenting). Thus, the State's purpose in encouraging acceptance of responsibility is unquestionably valid and is entitled to substantial weight.

Moreover, it is of considerable significance that the State's justification for encouraging acceptance of

responsibility is unrelated to any criminal investigative or prosecutive purpose. In holding that the *Griffin* rule forbidding comment on a defendant's silence was inapplicable to prison disciplinary hearings, this Court reasoned that "[i]n criminal cases, where the stakes are higher and the State's sole interest is to convict, *Griffin* [applies] * * *. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime." *Baxter* v. *Palmigiano*, 425 U.S. 308, 318-319 (1976). Thus, where the government acts for reasons unrelated to any purpose to obtain further convictions against the defendant, an indirect burden on the privilege should not be regarded as constituting an impermissible compulsion.

Respondent's probation was not conditioned on the successful completion of sexual offender treatment because of any purpose to obtain incriminating statements "from [respondent's] own lips" for use in future prosecutions. *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 284 (1968). Instead, the sentencing judge quite properly sought to foster respondent's rehabilitation and facilitate his early return to normal society while at the same time respecting the public's rightful expectation that convicted criminals will not be put back on the streets without at least some attempt to minimize the likelihood of recidivism. The State acted for rehabilitative purposes wholly unrelated to the investigative and prosecutive efforts against which the Fifth Amendment privilege is intended to protect; thus there is no justification for finding "compulsion" in the State's offer of probation conditioned on respondent's willingness to admit his offense.

C. Extension Of Leniency To Criminal Defendants Who Accept Responsibility For Their Criminal Conduct Does Not Constitute A "Penalty" Imposed On Criminal Defendants Who Choose To Exercise Their Right To Remain Silent

1. There are a host of situations in which the Court has found that burdens placed on the Fifth Amendment privilege do not amount to impermissible penalties on the assertion of the right. Most analogous to the instant case is the choice presented to a criminal defendant who is offered a lenient sentence in exchange for a guilty plea. In that situation, the pressure on a defendant to waive his right to remain silent may be substantial, particularly where the potential sentence on conviction is much more severe than the sentence offered as part of the plea bargain. Nonetheless, this Court has refused to find that the pressure inherent in plea bargaining constitutes an impermissible penalty or burden on the exercise of the Fifth Amendment privilege.

Thus, in *Brady* v. *United States*, 397 U.S. 742 (1970), the Court "decline[d] to hold * * * that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty," even though by pleading guilty the defendant was able to avoid the possibility of receiving the death penalty. 397 U.S. at 751. In *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the Court reaffirmed the validity of plea bargaining even while recognizing that "confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights.' " 434 U.S. at 364. And *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), confirmed "that a State may encourage

a guilty plea by offering substantial benefits in return for the plea." 439 U.S. at 218-219.

It is impossible to fashion a coherent theory of the Fifth Amendment that permits plea bargaining—despite its powerful "discouraging effect" on assertion of the privilege—yet otherwise forbids conditioning a lenient sentence on a defendant's willingness to accept responsibility for his criminal conduct.[9] Just as a guilty plea is "itself[] a consideration in sentencing" for which "a State may make due allowance in its sentencing decisions," *Corbitt* v. *New Jersey*, 439 U.S. at 224-225 nn. 14 & 15, so a defendant's acceptance of responsibility for his crimes—whether by way of guilty plea or otherwise—is a valid sentencing factor that the States and the federal government should be able to take into account in selecting appropriate punishments. Because a defendant's willingness to confess his guilt is rationally related to his prospects for rehabilitation, lenient treatment is both appropriate and constitutionally permissible.

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[9] It could be argued that plea bargaining imposes less of a burden on the privilege than does the requirement that a defendant accept responsibility for his conduct in order to obtain leniency, because a defendant who is offered a plea bargain knows that he may be able to avoid any punishment at all by remaining silent and securing an acquittal at trial. That argument does not hold up to analysis, however. It suggests that the "compulsion" inherent in a particular choice increases with the attractiveness of the option that requires surrendering the privilege. Under that reasoning, an especially attractive plea bargain would be deemed impermissibly coercive. The government would be prohibited from offering especially good bargains to a defendant, or from offering any bargain at all to a defendant with no realistic chance of acquittal. Nothing in any of this Court's plea bargaining cases provides even the remotest support for such a curious doctrine.

See *Brady* v. *United States*, 397 U.S. at 753. This Court's validation of plea bargaining thus compels the conclusion that the State has not imposed an impermissible penalty on the assertion of respondent's Fifth Amendment right.[10]

This calculus is not affected by the fact that acceptance of responsibility may, in some circumstances, entail more than a simple admission that the defendant committed the crimes of which he has been convicted. In this case, for example, in order to obtain treatment respondent would have had to admit his guilt not only of the crime of conviction but of perjury as well. Pet. App. 14a.[11] The theoretical possibility that a defendant's disclosure may come back to haunt him in a future prosecution does not transform the State's offer of leniency into impermissible "compulsion" any more than the certainty of conviction resulting from a guilty plea renders the plea

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[10] See *Corbitt* v. *New Jersey*, 439 U.S. at 223-224 ("There is no doubt that those * * * defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed. Those cases * * * unequivocally recognize the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based."); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("[I]n the 'give-and-take' of plea bargaining, there is no * * * element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.").

[11] Similar situations arise under the Sentencing Guidelines, which require acceptance of responsibility for "the offense and related conduct." Sentencing Guidelines § 3E1.1, Application Note 1(c); see note 3, *supra*. Cf. *State* v. *Gleason*, 576 A.2d 1246 (Vt. 1990).

bargaining process unconstitutional.[12] Because the denial of leniency to those defendants who choose to remain silent does not rise to the level of compulsion within the meaning of the Fifth Amendment, the privilege is not violated even if defendants cannot qualify for leniency without accepting responsibility for crimes beyond those for which they have been convicted.

2. The so-called "penalty" cases are not to the contrary. On the most obvious level, those cases are distinguishable because they involve burdens on the right to remain silent—for the most part, "the threat of the loss of employment," *Lefkowitz* v. *Turley*, 414 U.S. at 85—that are not involved in this case, and that are less analogous to the dilemma faced by respondent than is the practice of plea bargaining already validated by this Court.

Moreover, the "penalty" cases generally have involved factual scenarios much closer to those that gave rise to the Fifth Amendment privilege, in that the State was threatening imposition of a "potent sanction[]," *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 805 (1977), on individuals who refused to provide evidence against themselves as part of an ongoing investigation into potential wrongdoing. See, *e.g.*, *Garrity* v. *New Jersey*, 385 U.S. 493, 494 (1967);

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[12] Like an admission of criminality made in the sentencing context, a guilty plea is a judicial admission of criminal conduct that can be used against the defendant for a variety of purposes in future prosecutions. Thus, a guilty plea and a defendant's acceptance of responsibility for related criminal conduct may both be incriminating with respect to other potential criminal charges. Nonetheless, neither is "compelled" within the meaning of the Fifth Amendment merely because each is induced by the prospect of leniency.

Spevack v. *Klein*, 385 U.S. 511, 512-513 (1967); *Gardner* v. *Broderick*, 392 U.S. 273, 274-275 (1968); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 281-283 (1968); *Lefkowitz* v. *Turley*, 414 U.S. 70, 75-76 (1973); *Lefkowitz* v. *Cunningham*, 431 U.S. at 803-804. In each of those cases, the penalty was imposed solely for assertion of the privilege, thus proving that the individuals' "testimony was demanded * * * in part so that it might be used to prosecute" them. *Gardner*, 392 U.S. at 279; see also *Sanitation Men*, 392 U.S. at 283-284. The "penalty" cases thus involved violations of the settled principle that "for an agent of the State to pursue a course of action whose *objective* is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (citations omitted) (emphasis added); see also *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30, 33 n.20 (1973) ("[I]f the only objective of a state practice is to discourage the assertion of constitutional rights it is ' "patently unconstitutional." ' ").[13]

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[13] The Court's dictum in *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), that "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege," 465 U.S. at 438, must be read in a similar vein. See also *id.* at 435 ("[I]f the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation."). The *Murphy* Court was addressing the situation in which the State explicitly uses the threat of probation revocation to compel a probationer to provide incriminating evidence to assist the State's investigation of other criminal conduct. Where, as in this case, acceptance of responsibility is required in order to qualify for lenient sentencing treatment, the State's objective is not to gather evidence of guilt for use in future prosecutions or to penalize the assertion of the privilege, but rather to serve

In this case, by contrast, there is no suggestion that respondent was the subject of any ongoing criminal investigation, or that the State sought to obtain incriminating statements from him for use in future criminal proceedings. Nor did the State engage in any "course of action whose objective [was] to penalize [respondent's] reliance on his" Fifth Amendment right.[14] *Hayes*, 434 U.S. at 363. Rather, the sentencing judge merely reinstated the original prison sentence imposed for respondent's crime because respondent had failed to demonstrate that he qualified for more lenient treatment. Accordingly, there is no basis for extending the rationale of the "penalty" cases to the very different context of this case, and the logic of this Court's plea bargain cases compels the conclusion that respondent has not been impermissibly penalized for any assertion of his privilege against compelled self-incrimination.

D. Government May Withhold Discretionary Benefits From Individuals Who Fail To Prove They Are Entitled To Those Benefits Even If Their Failure Is Attributable To The Assertion Of Their Fifth Amendment Privilege

Respondent had no statutory or constitutional right to have his five-year prison sentence suspended in favor of probation.[15] The sentencing court exercised

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valid penological considerations militating in favor of lenient treatment of convicted criminals who acknowledge their prior criminal conduct.

[14] Indeed, respondent did not assert his Fifth Amendment privilege at all, but instead affirmatively denied committing the crime for which he had been convicted.

[15] See Mont. Code Ann. § 46-18-201(1) (1989) (sentencing court "may" suspend sentence and impose probation conditions in lieu of prison term).

its discretion to give respondent a chance to avoid prison on certain conditions. Pet. App. 19a-20a. In effect, the court offered respondent the opportunity to stay out of prison as long as he demonstrated that he was qualified to enjoy that privilege by complying with the conditions of his probation, including sex offender counseling. The burden was on respondent to enroll in and complete the required course of counseling and therapy.[16]

Respondent failed to meet that burden. His unwillingness to comply with the prerequisites to successful completion of therapy led him to violate a condition of his probation, and thus prevented him from showing that he had earned any leniency from the court.[17] The court's order revoking his probation was therefore an entirely legitimate response to respondent's failure to demonstrate that he continued to qualify for probationary status.

To be sure, respondent's failure to meet his burden under the probation order was, according to the state supreme court, the direct result of the exercise of his right against compelled self-incrimination. Pet. App. 8a, 14a-15a. That fact does not, however, convert the judge's revocation of probation from what it clearly was—a legitimate response to respondent's failure to

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[16] Similarly, under the Sentencing Guidelines, the burden is on convicted defendants to demonstrate that they are entitled to the two-level reduction in offense level for acceptance of responsibility. See, *e.g.*, *United States* v. *Mourning*, 914 F.2d 699, 705 (5th Cir. 1990).

[17] The State apparently bore the burden of proof at the revocation hearing, see Pet. App. 22a-23a, but it is clear that respondent had the initial burden of complying with the conditions of his probation by enrolling in and completing therapy.

demonstrate that he was deserving of leniency—into a penalty for invocation of the Fifth Amendment privilege. To the contrary, the fact that respondent was unable to satisfy the conditions of his grant of probation is fatal to his Fifth Amendment claim.

This Court has held that the Fifth Amendment privilege is not implicated when an individual's claim to a government benefit is rejected because his assertion of the privilege prevents him from establishing his entitlement to that benefit. In *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), for example, the Court upheld the denial of a commission to an Army doctor who, but for his refusal to say whether he had ever been associated with subversive organizations, would have received a commission. The Court rejected the doctor's claim that he had been penalized for his assertion of his Fifth Amendment rights, stating:

> No one * * * questions or doubts [petitioner's] right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question "No."

345 U.S. at 91. Similarly, in *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960) (per curiam), the Court upheld an alien's deportation order because the alien had not proved that he was eligible for discretionary suspension of deportation, even though he claimed that his inability to prove his eligibility was due to the assertion of his Fifth Amendment privilege. The Court assumed without deciding that the alien's assertion

of the privilege was justified, but concluded that "this did not relieve him under the statute of the burden of establishing" his eligibility for discretionary suspension of deportation. 363 U.S. at 408.[18]

The same principle was applied more recently in *United States* v. *Rylander*, 460 U.S. 752 (1983). In that case, the Court upheld the imposition of contempt sanctions on a taxpayer who had asserted the privilege in lieu of producing evidence to demonstrate his inability to comply with a court order. The Court stated that "[w]e have squarely rejected the

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[18] *Kimm* was criticized by the plurality in *Spevack* v. *Klein*, 385 U.S. 511, 514 n.2 (1967), but neither *Kimm* nor *Orloff* has been overruled. In *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), the Court distinguished *Orloff*, stating: "[*Orloff*] differs significantly from the [case] before us since the State here asks the architects to affirmatively expose themselves to criminal prosecution by waiving their privilege against self-incrimination, or from *Garrity* [v. *New Jersey*, 385 U.S. 493 (1967)], where the threat of criminal prosecution was apparent both from the nature of the proceeding, and the absence of applicable state immunity statutes." 414 U.S. at 82 n.2. In this case, by contrast, *Orloff* is directly applicable. The State did not require respondent affirmatively to waive his privilege, as in *Turley*, nor was the State conducting an ongoing criminal investigation in an effort to gain evidence to use against respondent in a future prosecution, as in *Garrity*.

The Court in *Turley* also distinguished *Kimm*, noting that the alien's "imminent departure from the country, whether it was voluntary or compelled, obviously made the threat of criminal prosecution on the basis of his answer remote." 414 U.S. at 82 n.2. In fact, however, the alien's primary claim in *Kimm* was that he was eligible to be considered for discretionary suspension of deportation, not merely for voluntary deportation. Thus, his claim, if accepted, could have prevented his deportation. Nonetheless, while assuming that the alien had a valid basis for asserting his privilege, the Court in *Kimm* refused to overturn the deportation order.

notion * * * that a possible failure of proof on an issue where the defendant had the burden of proof is a form of 'compulsion' which requires that the burden be shifted from the defendant's shoulders to that of the government." 460 U.S. at 758. The Court rejected the notion that the taxpayer's assertion of the privilege protected him from being sanctioned for his failure to meet his burden, because such a rule "would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his." *Id.* at 758.

The *Rylander* Court was careful to distinguish the valid sanction imposed on the taxpayer for his failure to satisfy his burden from an impermissible penalty imposed for assertion of the privilege itself: "Rylander was not * * * incarcerated because he refused to submit himself to cross-examination by the Government at the contempt hearing. He was held in contempt for failure to comply with a previous order of the District Court." 460 U.S. at 760. By the same token, respondent was not incarcerated as punishment for his refusal to admit his guilt but for his "failure to comply with a previous order of" the sentencing court, an order setting forth obligations respondent had to satisfy if he was to maintain his status as a probationer.

Orloff, *Kimm*, and *Rylander* are controlling here. The decision whether to extend lenient treatment to convicted criminals is one properly committed to the discretion of the sentencing court. A State may lawfully conclude that convicted defendants have no right to probation or other forms of lenient sentencing treatment, but instead must come forward with

affirmative evidence demonstrating that they qualify for such special treatment. See *Corbitt* v. *New Jersey*, 439 U.S. at 224 (recognizing "the constitutional propriety of * * * not extending leniency to those who have not demonstrated those attributes on which leniency is based"). The defendants' assertion of the Fifth Amendment privilege may make it difficult or impossible for them to meet that burden, but the denial of leniency to those who fail to qualify for it cannot be equated with punishment for assertion of the privilege.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

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No. 91-687

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

STATE OF MONTANA,
Petitioner,

vs.

DONALD GLENN IMLAY,
Respondent.

On Writ of Certiorari to the Montana Supreme Court

BRIEF OF *AMICUS CURIAE* AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN SUPPORTING NEITHER PARTY

John E.B. Myers
American Professional Society on the
Abuse of Children
3200 5th Ave.
Sacramento, CA 95817
(916) 739-7176

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Interest of the *Amicus Curiae*	i
Introduction and Summary of Argument	3
Argument	3
I. CHILD SEXUAL ABUSE IS A WIDESPREAD PROBLEM WITH SERIOUS PSYCHOLOGICAL CONSEQUENCES FOR MANY VICTIMS	3
II. SEX OFFENDER TREATMENT IS A COMPONENT OF AN INTEGRATED SOCIETAL RESPONSE TO CHILD SEXUAL ABUSE	8
III. ALTHOUGH SEX OFFENDER TREATMENT IS INCREASINGLY SOPHISTICATED, TREATMENT GENERALLY CANNOT BE EFFECTIVE UNLESS THE OFFENDER ADMITS THE ABUSE	11
A. DENIAL	14
B. COGNITIVE DISTORTION	16
C. INCREASING THE OFFENDER'S ABILITY TO EMPATHIZE WITH THE VICTIM	17
D. RISK FACTORS AND ANTECEDENTS TO SEXUAL ABUSE	17

TABLE OF CONTENTS — Continued

E. INCREASING SOCIAL COMPETENCE..... 18

F. SEXUAL AROUSAL 18

G. SUMMARY 19

CONCLUSION 19

TABLE OF AUTHORITIES

Cases PAGE

Maryland v. Craig, 110 S. Ct. 3157 (1990) 8

Other Authorities

Abel, Becker, Mittelman, Cunningham-Rathner, Rouleau & Murphy, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. Interpersonal Violence 3 (1987) 7

Abel, Mittelman, Becker, Rathner & Rouleau, *Predicting Child Molesters' Response to Treatment*, 528 Annals N.Y. Academy Sciences 223 (1988) 10,13

American Psychological Association, *Ethical Principles of Psychologists* (1990) 14

Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, 3 Forum on Corrections Research 30 (1991) 14,16

Beitchman, Zucker, Hood, daCosta, Akman & Cassavia, *A Review of the Long-Term Effects of Sexual Abuse*, 16 Child Abuse & Neglect 101 (1992) 4

Berliner, *Effects of Sexual Abuse on Children*, 1 Violence Update 1 (1991) 4,6,7

Bifulco & Adler, *Early Sexual Abuse and Clinical Depression in Adult Life*, 159 British J.Psychiatry 114 (1991) 5

Briere & Runtz, *Symptomatology Associated with Childhood Sexual Victimization in a Non-Clinical Sample*, 12 Child Abuse & Neglect 51 (1988) 6

TABLE OF AUTHORITIES — Continued

Briere & Zaidi, *Sexual Abuse Histories and Sequelae in Female Psychiatric Emergency Room Patients*,146 Am. J. Psychiatry 1602 (1989) 5

California Attorney General's Office, *California Child Victim Witness Judicial Advisory Committee: Final Report* (1988) 8

Chu & Dill, Dissociative Symptoms in Relation to Childhood Physical and Sexual Abuse, 147 Am. J. Psychiatry 887 (1990) 6

D. Finkelhor, *A Sourcebook on Child Sexual Abuse* (1986) 4

Finkelhor & Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 Am. J. Orthopsychiatry 530 (1985) 4

Finkelhor, Hotaling, Lewis & Smith, *Sexual Abuse and Its Relationship to Later Sexual Satisfaction, Marital Status, Religion, and Attitudes*, 4 J. Interpersonal Violence 379 (1989) 4,5,6

Friedrich, Grambsch, Broughton, Kuiper & Beilke, *Normative Sexual Behavior in Children*, 88 Pediatrics 456 (1991) 4

Furby, Weinrott, & Blackshaw, *Sex Offender Recidivism: A Review*, 105 Psychological Bulletin 3 (1989) 11

J. Goodwin, *Sexual Abuse: Incest Victims and their Families* (1982) 7

G. Hotaling, D. Finkelhor, J. Kirkpatrick & M. Straus, *Family Abuse and Its Consequences* (1988) 4

Jacobson, *Physical and Sexual Assault Histories Among Psychiatric Outpatients*, 146 Am. J. Psychiatry 755 (1989) 5

TABLE OF AUTHORITIES — Continued

Jacobson & Herald, *The Relevance of Childhood Sexual Abuse to Adult Psychiatric Inpatient Care*, 41 Hospital & Community Psychiatry 154 (1990) 5

Jacobson & Richardson, *Assault Experiences of 100 Psychiatric Inpatients: Evidence of the Need for Routine Inquiry*, 144 Am. J. Psychiatry 908 (1987) 5

Kelley, *Behavioral Reorientation of Pedophiles. Can it be Done?*, 2 Clinical Psychology Review 387 (1992) 19

B. Maletzky, *Treating the Sexual Offender* (1991) 15

B. Maletzky, *Data Generated by an Outpatient Sexual Abuse Clinic.* Paper presented at the 1st Annual Conference on the Assessment and Treatment of Sexual Abusers, Newport, Oregon (May 1987) 13

Marshall & Barbaree, *The Long-Term Evaluation of a Behavioral Treatment Program for Child Molesters*, 26 Behavior Research & Therapy 499 (1988) 13

K. Meiselman, Incest: *A Psychological Study of Causes and Effects With Treatment Recommendations* (1978) 5

Murphy, *Assessment and Modification of Cognitive Distortions in Sex Offenders, in Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender* (W. Marshall, D. Laws & H. Barbaree eds. (1990) 16

Murphy, Haynes, & Worley, *Assessment of Adult Sexual Interest, in Clinical Approaches to Sex Offenders and Their Victims* (C. Hollin & K. Howells eds. 1991) 18

TABLE OF AUTHORITIES — Continued

Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1 (1989) 11

Pithers, *Relapse Prevention with Sexual Aggressors: A Method for Maintaining Therapeutic Gain and Enhancing External Supervision, in Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender* (W. Marshall, D. Laws & H. Barbaree eds. 1990) 12

Pithers & Cumming, *Can Relapse be Prevented? Initial Outcome Data from the Vermont Treatment Program for Sexual Aggressors, in Relapse Prevention with Sex Offenders* (D. Laws ed. 1989) 13

Pribor & Dinwiddie, *Psychiatric Correlates of Incest in Childhood*, 149 Am. J. Psychiatry 52 (1992) 4

D. Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* (1986) 6

D. Russell, *Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment* (1984) 4

B. Smith, S. Hillenbrand & S. Goretsky, *The Probation Response to Child Sexual Abuse Offenders: How is it Working?* (American Bar Association, Criminal Justice Section 1990) 8,9,10,16

State of Washington, *Governor's Task Force on Community Protection* (1989) 7

Stein, Golding, Siegel, Burnam & Sorenson, *Long Term Psychological Sequelae of Child Sexual Abuse: The Los Angeles Epidemiological Catchment Area Study, in Lasting Effects of Child Sexual Abuse* 135 (G. Wyatt & G. Powell eds. 1988) 6

TABLE OF AUTHORITIES — Continued

U.S. Department of Justice, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender: Breaking the Cycle of Sexual Abuse* (1988) 16

Wash. Admin. Code 246-930-010, 246-930-301 to 246-930-340 9

Wash. Rev. Code Ann. 9.94A.120(7) (1992 Cum. Pocket Part) 9

Weinrott & Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. Interpersonal Violence 286 (1991) 7

Wolfe, *Northwest Treatment Associates: A Comprehensive Community-Based Evaluation and Treatment Program for Adult Sex Offenders, in Retraining Adult Sex Offenders: Methods and Models* (F. Knopp ed. 1984) 13

Wyatt, *The Sexual Abuse of Afro-American and White-American Women in Childhood*, 9 Child Abuse & Neglect 507 (1985) 4

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DONALD GLENN IMLAY,

Respondent.

On Writ of Certiorari to the Montana Supreme Court

BRIEF OF *AMICUS CURIAE* AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN

INTEREST OF THE *AMICUS CURIAE*

The American Professional Society on the Abuse of Children (APSAC) is an interdisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy.[1] The purposes of APSAC are to promote effective identification, intervention and treatment of abused children, their

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1. The information contained in this brief was supplied largely by Lucy Berliner, M.S.W., William D. Murphy, Ph.D., William D. Pithers, Ph.D., and Robert Prentky, Ph.D.

families, and offending individuals. APSAC was founded in 1987 and has more than 2,200 members.

Amicus, with the written consent of the parties, respectfully submits this brief to call the Court's attention to contemporary issues in the psychological treatment of individuals who sexually abuse children. This brief supports neither party, and *Amicus* takes no position on the outcome of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Child sexual abuse is a serious and widespread problem in America. Sex offender treatment is a useful alternative to incarceration for certain convicted offenders. For treatment to be effective, however, the offender must admit that the abuse occurred. Efforts to provide meaningful offender treatment will be severely undermined unless offenders can be required to admit the abuse as a precondition to treatment, and unless failure to admit can lead to termination of treatment and revocation of probation or parole. A policy which allows convicted sex offenders both to avoid incarceration and to thwart meaningful treatment by refusing to admit the abuse would pose a serious threat to community safety and effective rehabilitation of offenders.

ARGUMENT

I. CHILD SEXUAL ABUSE IS A WIDESPREAD PROBLEM WITH SERIOUS PSYCHOLOGICAL CONSEQUENCES FOR MANY VICTIMS

Sexual abuse touches the lives of thousands of

children each year in the United States.[2] Research indicates "that as many as 10% to 15% of boys and 20% to 25% of girls experience at least one instance of sexual misuse prior to the age of 18 . . . ."[3] In a nationwide survey of sexually abused children, "[t]he median age at time of abuse was 9.9 years for boys and 9.6 for girls."[4] Child sexual abuse occurs at all ages, however, from infancy to adolescence.

It has long been known that sexual abuse has a negative psychological impact on children. A large and growing body of research describes the short- and long-term effects of child sexual abuse.[5] The long-term consequences of sexual abuse during childhood are devastating for many

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2. D. Russell, *Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment* (1984); G. Hotaling, D. Finkelhor, J. Kirkpatrick & M. Straus, *Family Abuse and Its Consequences* (1988); Wyatt, *The Sexual Abuse of Afro-American and White-American Women in Childhood*, 9 Child Abuse & Neglect 507 (1985).

3. Friedrich, Grambsch, Broughton, Kuiper & Beilke, *Normative Sexual Behavior in Children*, 88 Pediatrics 456, 462 (1991). See also, D. Finkelhor, *A Sourcebook on Child Sexual Abuse* (1986).

4. Finkelhor, Hotaling, Lewis & Smith, *Sexual Abuse and Its Relationship to Later Sexual Satisfaction, Marital Status, Religion, and Attitudes*, 4 J. Interpersonal Violence 379, 381 (1989).

5. Beitchman, Zucker, Hood, daCosta, Akman & Cassavia, *A Review of the Long-Term Effects of Sexual Abuse*, 16 Child Abuse & Neglect 101 (1992); Berliner, *Effects of Sexual Abuse on Children*, 1 Violence Update 1 (1991); Finkelhor & Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 Am. J. Orthopsychiatry 530 (1985); Pribor & Dinwiddie, *Psychiatric Correlates of Incest in Childhood*, 149 Am. J. Psychiatry 52 (1992).

victims.[6] The earliest systematic reports on long-term effects focused on incest victims who were receiving psychotherapy. These reports found that incest survivors have more severe symptoms than psychiatric patients who have not be sexually abused.[7] Later research examined the prevalence of child sexual abuse in adults who are receiving mental health services.[8] The percentage of psychiatric patients who were abused as children was strikingly high. Several studies indicate that over eighty percent of psychiatric inpatients have some kind of abuse history.[9]

Studies of the general, nonpsychiatric population confirm that abuse survivors experience high levels of abuse-

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6. Finkelhor, Hotaling, Lewis & Smith, *Sexual Abuse and Its Relationship to Later Sexual Satisfaction, Marital Status, Religion, and Attitudes*, 4 J. Interpersonal Violence 379, 380 (1989) ("a history of abuse is a risk factor for adult problems").

7. K. Meiselman, *Incest: A Psychological Study of Causes and Effects With Treatment Recommendations* (1978).

8. Bifulco & Adler, *Early Sexual Abuse and Clinical Depression in Adult Life*, 159 British J. Psychiatry 114 (1991); Briere & Zaidi, *Sexual Abuse Histories and Sequelae in Female Psychiatric Emergency Room Patients*, 146 Am. J. Psychiatry 1602 (1989); Jacobson, *Physical and Sexual Assault Histories Among Psychiatric Outpatients*, 146 Am. J. Psychiatry 755 (1989) (68% of thirty-one psychiatric outpatients questioned had experienced major physical and/or sexual abuse).

9. See, e.g., Jacobson & Herald, *The Relevance of Childhood Sexual Abuse to Adult Psychiatric Inpatient Care*, 41 Hospital & Community Psychiatry 154 (1990); Jacobson & Richardson, *Assault Experiences of 100 Psychiatric Inpatients: Evidence of the Need for Routine Inquiry*, 144 Am. J. Psychiatry 908 (1987).

related problems.[10] Moreover, the more invasive the sexual abuse, the more likely the victim will suffer long-term adjustment problems.[11] "Victims who had experienced abuse involving attempted or actual intercourse reported more marital disruption in adulthood, a lower level of satisfaction with their current heterosexual relationships, and a greater tendency not to practice any religion."[12] Adult survivors are more anxious, have more dissociative[13] and somatic symptoms, and have lower self-esteem than adults without a history of child abuse.[14]

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10. Briere & Runtz, *Symptomatology Associated with Childhood Sexual Victimization in a Non-Clinical Sample*, 12 Child Abuse & Neglect 51 (1988); Stein, Golding, Siegel, Burnam & Sorenson, *Long Term Psychological Sequelae of Child Sexual Abuse: The Los Angeles Epidemiological Catchment Area Study*, in *Lasting Effects of Child Sexual Abuse* 135 (G. Wyatt & G. Powell eds. 1988).

11. D. Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* (1986).

12. Finkelhor, Hotaling, Lewis & Smith, *Sexual Abuse and Its Relationship to Later Sexual Satisfaction, Marital Status, Religion, and Attitudes*, 4 J. Interpersonal Violence 379, 382 (1989).

13. Chu & Dill, *Dissociative Symptoms in Relation to Childhood Physical and Sexual Abuse*, 147 Am. J. Psychiatry 887 (1990).

14. Survivors of child sexual abuse are at significant risk of developing depression, various anxiety disorders, including post-traumatic stress disorder, substance abuse disorders, and sexual dysfunction. High rates of childhood sexual abuse are found in the histories of adults with conversion reaction, suicidality, self-mutilation, multiple personality disorder, borderline personality, chronic pelvic pain, and eating disorders. Childhood sexual abuse is found in a large percentage of adolescent prostitutes and runaways. See Berliner, *Effects of Sexual Abuse on Children*, 1 Violence Update 1 (1991).

Turning to the short-term effects of sexual abuse on children, numerous publications describe negative effects.[15] Common effects include fear and anxiety, feelings of guilt, depression, shame, anger, self-destructiveness, and inappropriate sexual or aggressive behavior.[16]

Given the widespread nature of child sexual abuse, and the harmful short- and long-term consequences of such abuse, it is clear that effective steps must be taken to protect society from individuals who sexually abuse children. The need for community protection is highlighted by research which discloses that "[m]ost prosecuted sex offenders have other, unreported victims. A small number of offenders have hundreds of victims."[17]

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15. Berliner, *The Effects of Sexual Abuse on Children*, 1 Violence Update 1 (1991); J. Goodwin, *Sexual Abuse: Incest Victims and their Families* (1982).

16. See authorities collected in footnote 15, *supra*.

17. State of Washington, *Governor's Task Force on Community Protection* II-1 (1989).

For research discussing sex offenders with multiple victims see Abel, Becker, Mittelman, Cunningham-Rathner, Rouleau & Murphy, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. Interpersonal Violence 3 (1987). In this study, 561 male paraphiliacs were interviewed and asked to self-report deviant sexual conduct. To overcome resistance to admitting deviance, the men were guaranteed confidentiality. Among men who sexually abused children, the mean number of acts of child molestation was 23.2 for men who abused female children unrelated to the offender. The mean number of acts of child molestation was 281.7 per offender for men who abused male children unrelated to them. For perpetrators of incest, the mean number of acts involving female children was 81.3 compared to 62.3 for male children. Among rapists, the mean number of rapes per rapist was 7.2.

II. SEX OFFENDER TREATMENT IS AN IMPORTANT COMPONENT OF AN INTEGRATED SOCIETAL RESPONSE TO CHILD SEXUAL ABUSE

As society came to grips with the scope and seriousness of child sexual abuse, important changes occurred. The number of child sexual abuse prosecutions increased.[18] Prosecutors, law enforcement officers, and child protective services social workers received specialized training. Efforts were initiated to reduce the number of times children are interviewed, and to improve the quality of investigative interviews.[19] Legislatures and courts took measured steps to make the courtroom less traumatic for children.[20] Increased emphasis was placed on treatment for victims of child sexual abuse. States created specialized probation and parole units to monitor sex offenders in the community.

Along with the efforts described above, attention focused on the proper response to offenders. Society has long been uncertain about the appropriate disposition of individuals who sexually abuse children. Child sexual abuse is a serious crime in all jurisdictions. Nevertheless, many

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See also, Weinrott & Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. Interpersonal Violence 286 (1991).

18. B. Smith, S. Hillenbrand & S. Goretsky, *The Probation Response to Child Sexual Abuse Offenders: How is it Working?* 1 (American Bar Association, Criminal Justice Section, 1990)[hereafter cited as *ABA: The Probation Response*].

19. See California Attorney General's Office, *California Child Victim Witness Judicial Advisory Committee: Final Report* (1988).

20. *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

convicted offenders are sentenced to probation, with a requirement that the offender participate in "treatment for the offender's sexual orientation to children."[21] With so many sex offenders "on the street," and at risk of reoffending, effective treatment is essential to community safety.[22]

When sexual abuse occurs within the family, many victims and non-offending parents prefer treatment for the offender. Indeed, in many intrafamilial abuse cases the primary reason for reporting sexual abuse and cooperating with law enforcement authorities is to obtain treatment and supervision for the offender. Victims and non-offending parents may hesitate to report abuse if the only possible outcome for the offender is incarceration.

Effective treatment depends on cooperation between treatment professionals and the criminal justice system,

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21. *ABA, The Probation Response, supra* note 18 at 7. See *id.* at 3 ("Psychological counseling for the abuser was the offense-specific condition most often ordered for child sexual abuse probationers").

A number of states have sophisticated statutory schemes for alternative sentencing of selected sex offenders. See, e.g., Wash. Rev. Code Ann. § 9.94A.120(7) (1992 Cum. Pocket Part); Wash. Admin. Code §§ 246-930-010, 246-930-301 to 246-930-340.

22. To be effective, treatment must: (1) be tailored to the needs of the individual, (2) use treatment modalities which have the most promise, (3) be provided by a clinician with experience and sophistication in treating sex offenders, and (4) provide after care once formal treatment has ended.

Effective offender treatment is important because untreated offenders reoffend at higher rates than treated offenders. See section III, infra. Since virtually all child molesters eventually live in the community, public safety is enhanced when effective treatment is provided.

particularly courts and probation and parole officials. The courts play a critical role by mandating participation in treatment as a condition of probation or parole. Court-ordered treatment provides an important external motivator for offenders to enter and remain in treatment. Offenders are well aware that failure to participate in treatment may lead to incarceration. This external motivator keeps offenders engaged in treatment long enough for the therapeutic process to take root, replacing external control with self-motivation to control deviant sexual behavior.[23]

The second important function of the criminal justice system derives from the coordinated effort of therapists and probation and parole staffs to monitor the behavior of offenders in the community.[24] Most expert on offender treatment agree "that coordination between the therapist and

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23. There is evidence that court-mandated treatment, along with penalties for not participating in treatment, increase participation. Abel and his colleagues conducted an extensive treatment program in which offenders were free to withdraw without adverse consequences. Abel found a 35% dropout rate from treatment. In treatment programs where participation was mandated by court order, the dropout was much lower. Abel, Mittleman, Becker, Rathner & Rouleau, *Predicting Child Molesters' Response to Treatment*, 528 Annals N.Y. Academy Sciences 223 (1988). No treatment program can be effective if offenders do not participate. Given the high cost of reoffending to victims and society, the use of court-mandated treatment as a mechanism to initially motivate offenders appears warranted.

24. See *ABA, The Probation Response*, *supra* note 18, where the report states:

> [C]lose communication and coordination between probation officers and treatment providers is important to monitor the offender adequately.

Id. at 9-10.

probation officer [is] critical to successful treatment of the offender."[25]

III. ALTHOUGH SEX OFFENDER TREATMENT IS INCREASINGLY SOPHISTICATED, TREATMENT GENERALLY CANNOT BE EFFECTIVE UNLESS THE OFFENDER ADMITS THE ABUSE

Historically, the treatment of sex offenders was based on the application of general mental health principles to this population.[26] That is, offenders were treated with psychotherapeutic and psychiatric techniques used with the broad array of psychiatric patients. Treatment was generalized, focusing on issues such as relationships with parents, early trauma, interpersonal relationships, and symptoms such as depression or anxiety. Early treatment efforts did not focus on sex offending per se, or on the situational factors leading directly to deviant sexual behavior. The goal of therapy was to "cure" the problem. Given the intractable nature of sexual deviancy, it is not surprising that the few early reports in the literature describe mixed results in terms of treatment effectiveness.[27]

Recent developments in the treatment of sex offenders differ in a variety of ways from earlier techniques. First, there is now widespread recognition that sexually deviant

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25. *ABA, The Probation Response*, *supra* note 18 at 9.

26. See Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 135–39 (1989).

27. Furby, Weinrott, & Blackshaw, *Sex Offender Recidivism: A Review*, 105 Psychological Bulletin 3 (1989).

thoughts and behaviors probably cannot be "cured." Thus, the focus of contemporary treatment is on techniques designed to help offenders control a life-long tendency toward deviant behavior. A second aspect of modern offender treatment is that treatment focuses on specific offending behaviors, and on the factors directly related to such behaviors.[28] A third component of modern treatment is the recognition by mental health professionals that the criminal justice system plays an indispensable role in getting offenders into treatment and keeping them there. The threat of incarceration provides the motivation necessary for many sex offenders to engage meaningfully in treatment. A fourth element of contemporary offender treatment also relates to the law. Mental health professionals recognize the importance of probation and parole officials as co-equal partners in monitoring offenders residing in the community.

For the most part, current models of sex offender treatment rely upon a cognitive behavioral approach to treatment. The focus of therapy is on preventing relapse rather than "cure."[29] Cognitive behavioral therapy concentrates specifically on the thoughts, feelings, and behaviors linked to sex offending. Efforts are made to assist offenders to recognize the psychological processes that allow offenders to maintain deviant behavior, and which increase the risk of reoffending.

There is increasing scientific evidence that the cognitive behavioral approach is effective in reducing

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28. See Section III. D., *infra*.

29. Pithers, *Relapse Prevention with Sexual Aggressors: A Method for Maintaining Therapeutic Gain and Enhancing External Supervision*, in *Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender* (W. Marshall, D. Laws & H. Barbaree eds. 1990).

recidivism among sex offenders. Marshall and Barbaree studied offenders receiving outpatient treatment and found a four year recidivism rate of 25% for treated offenders versus 60% for nontreated offenders.[30] Other studies of outpatient treatment utilizing cognitive behavioral principles provide similar results. Wolfe found recidivism rates between 0% and 4.5%.[31] Maletsky found 5% to 14% recidivism.[32] Abel, Mittleman, Becker, Rathner, and Rouleau found rates of recidivism from 12% to 18%.[33]

Pithers and Cumming studied a group of sex offenders who received cognitive behavioral treatment while imprisoned.[34] Following release from prison, the offenders were followed for up to six years. The rate of recidivism

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30. Marshall & Barbaree, *The Long-Term Evaluation of a Behavioral Treatment Program for Child Molesters*, 26 Behavior Research & Therapy 499 (1988).

31. Wolfe, *Northwest Treatment Associates: A Comprehensive Community-Based Evaluation and Treatment Program for Adult Sex Offenders*, in *Retraining Adult Sex Offenders: Methods and Models* (F. Knopp ed. 1984).

32. B. Maletsky, *Data Generated by an Outpatient Sexual Abuse Clinic*. Paper presented at the 1st Annual Conference on the Assessment and Treatment of Sexual Abusers, Newport, Oregon (May 1987).

33. Abel, Mittleman, Becker, Rathner & Rouleau, *Predicting Child Molesters' Response to Treatment*, 528 Annals N.Y. Academy Sciences 223 (1988).

34. Pithers & Cumming, *Can Relapse be Prevented? Initial Outcome Data from the Vermont Treatment Program for Sexual Aggressors*, in *Relapse Prevention with Sex Offenders* (D. Laws ed. 1989).

among this group of 137 child molesters was 3%.[35]

Treatment programs which yield the most promising recidivism rates share the components discussed below in subsections "A" through "F." When these components are operational, it is reasonable to conclude that state of the art offender treatment, although far from perfect, can significantly reduce recidivism, thus reducing the total number of victimized children. None of the essential components of modern offender treatment can be fully implemented until the offender admits that the abuse occurred.

A. Denial

Denial is a common phenomenon in offender treatment.[36] As treatment has become more sophisticated, methods for overcoming denial and encouraging honesty have been developed.[37] Certain offenders continue to deny the abuse, however, despite the best efforts of therapists.

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35. In the Pithers and Cummings study, *supra* note 34, the offenders were closely monitored in the community. It is likely that this close supervision played an important role in achieving a low rate of recidivism.

36. Denial occurs on a continuum. At one end of the continuum is the offender who denies altogether that he committed the abusive act. Such denial makes treatment impossible. By contrast, an offender who acknowledges that he committed the act, but who denies that the act was harmful or wrong may well be amenable to treatment. Indeed, denial of the wrongfulness of conduct is common, and is often a focus of successful therapy.

37. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, 3 Forum on Corrections Research 30 (1991).

Regardless of the psychiatric problem for which a patient seeks treatment, common sense indicates that effective therapy is difficult if the patient denies there is a problem.[38] When denial occurs in the context of sex offender treatment, treatment difficulties multiply. By its very nature, sex offender treatment requires the offender to address issues related specifically to deviant sexual behavior. The offender must be willing to acknowledge and discuss a number of mental events related to deviancy. Maletzky describes the role of denial in treatment failure:

> The manner in which the patient regarded his offender behavior also bore some relevance to the issue of failing treatment. For example, the offender who wholly denied allegations of sexual abuse was three times as likely to fail than the offender who even partially admitted his complicity. Similarly, an offender who was totally opposed to treatment had a two and a half times greater likelihood of failing than the offender who at least minimally accepted (even if begrudgingly) the necessity of treatment.[39]

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38. When a mental health professional determines that a psychiatric patient is not benefitting from treatment, the professional may have an ethical obligation to terminate treatment. See American Psychological Association, *Ethical Principles of Psychologists* (1990). Principle 6(e) states:

> Psychologists terminate a clinical or consulting relationship when it is reasonably clear that the consumer is not benefitting from it. They offer to help the consumer locate alternative sources of assistance.

39. B. Maletzky, *Treating the Sexual Offender*, 253–55 (1991).

In a practitioner's guide to treating sex offenders, the U.S. Department of Justice writes that the first goal of treatment is that "[t]he offender should be able to openly acknowledge guilt. This admission is a basic requirement for meaningful participation."[40] The clear consensus of professional opinion is that an offender who denies that abuse occurred cannot engage in the treatment process, rendering progress all but impossible.[41]

B. Cognitive Distortion

An important component of offender treatment consists of addressing and correcting the offender's cognitive distortions.[42] Cognitive distortions are thoughts and attitudes which allow offenders to minimize, justify, and rationalize their deviant behavior. Common cognitive

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40. U.S. Department of Justice, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender: Breaking the Cycle of Sexual Abuse* 73 (1988).

41. See *ABA, The Probation Response*, *supra* note 18, where the report describes the position of therapists regarding the relationship between denial and successful therapy:

> With few exceptions, the therapists interviewed said they would not accept anyone in their program who absolutely denied sexual conduct with children. Most firmly believed that individuals who denied the abuse were not amenable to treatment.

Id. at 8.

42. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, 3 Forum on Corrections Research 30 (1991); Murphy, *Assessment and Modification of Cognitive Distortions in Sex Offenders*, in *Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender* (W. Marshall, D. Laws & H. Barbaree eds. 1990).

distortions include statements such as, "It was just sex education," "She was seductive" (referring to a seven-year-old), and, "I did it because my wife rejected me sexually." Cognitive distortions provide offenders an excuse to engage in deviant sexual behavior, and serve to reduce guilt. Treatment cannot go forward until the offender acknowledges the role of cognitive distortions and willingly discusses the use of such distortions prior to, during, and following sexual abuse. An offender who denies the abuse cannot accurately discuss cognitive distortions, thus undermining treatment.

C. Increasing the Offender's Ability to Empathize with the Victim

Lack of empathy for the victim is a common feature of adults who sexually abuse children. As with cognitive distortion, lack of empathy facilitates sexual abuse by insulating the perpetrator from the consequences of the offense. Thus, assisting offenders to come to terms with the significant negative impact of child sexual abuse--to have empathy with the victim--is a crucial step in treatment. The capacity to empathize with the victim increases the offender's ability to control the urge to engage in deviant sexual behavior. Offenders who do not admit the abuse do not explore the excuses used to justify such behavior, and are unlikely to develop empathy for the victim.

D. Risk Factors and Antecedents to Sexual Abuse

Current knowledge of deviant sexual behavior suggests that most sex offenses are not spur of the moment events. On the contrary, most offenses are planned, and it is possible--with the cooperation of the offender--to identify the sequence of events leading up to offenses. Each offender has a set of "risk factors" for deviant sexual behavior. One common risk factor is placing the offender in a situation

where offending is likely to occur, such as being alone with a child. Other risk factors include specific thoughts, fantasies, or behaviors which trigger a desire to engage in deviant sexual conduct. Risk factors are antecedent events that increase the probability of an offense. Identifying the offender's unique risk factors is an essential component of successful treatment. Identification of risk factors allows the therapist to teach the offender to detect the early warning signs leading to deviance, and to interrupt the chain of events before an offense occurs. The identification of risk factors is next to impossible when the offender denies that abuse occurred.

E. Increasing Social Competence

Sex offenders often have deficits in basic social skills. Many offenders are poor problem solvers, have poor anger or stress management skills, lack assertiveness, and lack skills for developing healthy adult relationships. One goal of offender treatment is to provide basic skills training to improve the offender's ability to deal effectively with social situations. Enhancing social competence requires ongoing monitoring and accurate self-reporting by the offender. When offenders deny the offense, the therapist has difficulty assessing the offender's development of appropriate social skills.

F. Sexual Arousal

There is ample scientific evidence that many offenders are sexually attracted to children.[43] Modern treatment methods are increasingly effective in altering patterns of

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43. Murphy, Haynes, & Worley, *Assessment of Adult Sexual Interest*, in *Clinical Approaches to Sex Offenders and Their Victims* (C. Hollin & K. Howells eds. 1991).

deviant sexual arousal, or, at a minimum, teaching offenders to control their deviant arousal patterns.[44] For treatment to be effective, however, offenders must be willing to discuss deviant sexual urges and fantasies during treatment. The ability to assess and monitor deviant sexual arousal is severely limited in individuals who deny sexual abuse.

G. Summary

Several conclusions can be drawn from the foregoing discussion. First, there is reasonable consensus among experts on sex offender treatment regarding the major components of effective treatment. Second, recent research allows cautious optimism that treatment can reduce recidivism. Third, for treatment to be effective, the offender must be cooperative and willing to discuss thoughts, feelings, and behaviors surrounding the offense. In short, effective treatment requires the offender to admit that the abuse occurred.

CONCLUSION

Child sexual abuse is a serious social ill with terrible consequences for many victims. Modern offender treatment can reduce recidivism, thereby improving the lives of offenders and protecting children. The evidence is clear, however, that treatment is not effective for offenders who deny that abuse occurred. In the instant case, the Court can further society's effort to reduce child abuse by crafting a decision which accommodates the necessity in sex offender treatment of overcoming denial.

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44. Kelley, *Behavioral Reorientation of Pedophiles. Can it be Done?*, 2 Clinical Psychology Review 387 (1992).

Respectfully submitted,

John E.B. Myers
American Professional Society on the Abuse of Children
3200 5th Ave.
Sacramento, CA 95817
(916) 739–7176

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In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD G. IMLAY,

Respondent.

On Writ Of Certiorari To The Montana Supreme Court

BRIEF SUBMITTED BY THE STATE OF VERMONT ON BEHALF OF THE STATES OF ALASKA, ARIZONA, DELAWARE, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, NEVADA, NEW JERSEY, NORTH CAROLINA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

JEFFREY L. AMESTOY
Attorney General
State of Vermont

DONAL F. HARTMAN, JR.*
Assistant Attorney General
Pavilion Building
Montpelier, Vermont 05602
Telephone: (802) 828-3171
(802) 241-2288

*Counsel of Record

(Listing of Counsel Continued Inside)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

(Counsel Continued)

CHARLES E. COLE
Attorney General of Alaska
State Capitol
P.O. Box 110300
Juneau, Alaska 99811

PAUL J. McMURDIE
Attorney General of
Arizona
1275 West Washington
Phoenix, Arizona 85007

CHARLES M. OBERLY, III
Attorney General of
Delaware
820 North French Street
Wilmington, Delaware 19801

ROBERT T. STEPHAN
Attorney General of
Kansas
Kansas Judicial Center
301 West 10th Street
Topeka, Kansas 66612

CHRIS GORMAN
Attorney General of
Kentucky
The Capitol, Suite 116
Frankfort, Kentucky 40601

RICHARD P. IEYOUB
Attorney General of
Louisiana
P.O. Box 94005
Baton Rouge, Louisiana
70804-9005

FRANK J. KELLEY
Attorney General of
Michigan
P.O. Box 30212
Lansing, Michigan 48909

FRANKIE SUE DEL PAPA
Attorney General of
Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710

ROBERT J. DEL TUFO
Attorney General of
New Jersey
25 Market Street
Trenton, New Jersey 08625

LACY H. THORNBURG
Attorney General of
North Carolina
P.O. Box 629
Raleigh, North Carolina
27602

LEE FISHER
Attorney General of Ohio
State Office Tower
17th Floor
30 East Broad Street
Columbus, Ohio 43266-0410

ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania
15th Floor,
Strawberry Square
Harrisburg, Pennsylvania
17120

T. TRAVIS MEDLOCK
Attorney General of
South Carolina
P.O. Box 11549
Columbia, South Carolina
29211

MARK BARNETT
Attorney General of
South Dakota
500 East Capitol Avenue
Pierre, South Dakota
57501-5070

PAUL VAN DAM
Attorney General of
Utah
236 State Capitol
Salt Lake City, Utah 84114

MARY SUE TERRY
Attorney General of
Virginia
101 North 8th Street
Richmond, Virginia 23219

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI 1

STATEMENT 2

SUMMARY OF ARGUMENT 4

ARGUMENT:

THE MONTANA SUPREME COURT ERRED IN RULING THAT A REQUIRED ADMISSION TO SEXUAL ASSAULT IN A TREATMENT PROGRAM REQUIRED AS A CONDITION OF PROBATION AMOUNTED TO COMPULSION UNDER THE FIFTH AMENDMENT 5

A. Context of the Inquiry 5

B. Probation as a Civil Process 11

C. The Need for Treatment 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Allen v. Illinois, 478 U.S. 364 (1986) 11, 13, 15

Asherman v. Meachum, No. 90-2530, slip op. (2d Cir. Feb. 13, 1992) 8

Baxter v. Palmigiano, 425 U.S. 308 (1976) 9

Chaffin v. Stynchcombe, 412 U.S. 17 (1973) 6

Gagnon v. Scarpelli, 411 U.S. 781 (1973) 12, 13

Gardner v. Broderick, 392 U.S. 273 (1968) 7, 9

Griffin v. Wisconsin, 483 U.S. 868 (1987) 11, 12, 13

Jenkins v. Anderson, 447 U.S. 231 (1980) 6

Kastigar v. United States, 406 U.S. 441 (1972) 14

Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 8, 9

Lefkowitz v. Turley, 414 U.S. 70 (1973) 5, 7

McGautha v. California, 402 U.S. 183 (1971) 6

Minnesota v. Murphy, 465 U.S. 420 (1984) 8, 10

Morrissey v. Brewer, 408 U.S. 471 (1972) 13

Murphy v. Waterfront Commissioner, 378 U.S. 52 (1964) 7

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 12

Sanitation Men v. Sanitation Commissioner, 392 U.S. 280 (1968) 7, 8

Turner v. Safley, 482 U.S. 78 (1987) 12

Ullman v. United States, 350 U.S. 422 (1956) 5

United States v. Washington, 431 U.S. 181 (1977) 5, 6

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

U.S. Const. Amend. IV 12

U.S. Const. Amend. V (Self-Incrimination Clause) ... *passim*

U.S. Const. Amend. VI 12

STATUTES

Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat., Ch. 385, Paras. 105-1 - 105-12 14

MISCELLANEOUS

W.D. Pithers, L.S. Beal, J. Armstrong, J. Petty, *Identification of Risk Factors Through Clinical Interviews and Analysis of Records,* in *Relapse Prevention with Sex Offenders,* (D. Laws, ed. 1989), at 83 15

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Interest of Amici Curiae

The State of Vermont, and the other *amici* states and commonwealths, through their respective Attorneys General, appear on behalf of their citizens and file this brief pursuant to Rule 37 of the rules of this Court. The *amici curiae* administer criminal justice systems within their jurisdictions to promote the safety and welfare of their citizens. The decision of the Montana Supreme Court takes an expansive view of the

right against self-incrimination stated in the Fifth Amendment of the United States Constitution. The broad application of the right against self-incrimination as expressed by the Montana Supreme Court requires the displacement of general health principles in the treatment of sex offenders in favor of a strict application of the protection from self-incrimination applicable in criminal proceedings. The decision misconstrues the essentially civil nature of probation proceedings by focusing solely on the theoretical criminal sanctions imposable on offenders who must answer relevant state inquiries in out-patient treatment programs required as a condition of probation. The failure by the Montana Supreme Court to properly address the essential purpose of the Fifth Amendment threatens to undercut the integrity of the decisions of this Court by endorsing an impermissible standard of analysis for Fifth Amendment issues. The decision also fails to preserve the concept of federalism acknowledged by this Court in prior decisions by penalizing the State of Montana's effort to address sex offender treatment.

STATEMENT

The respondent was convicted by jury against his plea for the offense of sexual assault in the District Court of Montana. (Pet. App. 2a). Following conviction, the respondent was sentenced to five years in the Montana State Prison, all suspended but 35 days. (Pet. App. 2a). The court imposed a number of conditions of probation, including the condition that the respondent enroll in and complete a sexual therapy program at his own expense. (Pet. App. 2a). The respondent was placed on formal supervised probation and ordered to submit to therapy at a sexual offender treatment program at his own expense. (Pet. App. 4a). After attending

a number of counseling sessions, the respondent was informed that he would not qualify for the treatment program because he would not admit that he committed sexual assault on the seven-year old girl, the offense for which he had been charged and convicted. (Pet. App. 5a). The County Attorney petitioned the District Court for revocation of the respondent's suspended sentence. (Pet. App. 4a). At the subsequent revocation of probation proceeding in District Court, the program director testified that the respondent's denial that he committed an act of sexual misconduct made it impossible for him to treat the respondent in the program. (Pet. App. 6a). The District Court found the respondent in violation of his condition of probation, revoked his suspended sentence, and ordered him to serve five years in the Montana State Prison. (Pet. App. 7a).

The Montana Supreme Court on appeal of the respondent's revocation of probation concluded that the respondent had complied in every way with the condition requiring sex offender treatment except for his refusal to admit to guilt of the offense for which he had been convicted. (Pet. App. 8a, 9a). The court concluded that the respondent's revocation of probation based upon his denial of the offense was a penalty exacted for his refusal to incriminate himself. (Pet. App. 14a). The court reasoned that even though the respondent had already been convicted of the crime, under Montana law he retained the right to challenge his conviction. (Pet. App. 14a). An admission of guilt would nullify these rights. (Pet. App. 14a). The court further reasoned that since the respondent had already testified at trial to his innocence, an admission of guilt in a treatment program would subject him to prosecution for perjury. (Pet. App. 14a). As

a remedy, the Montana Supreme Court vacated the sentence and remanded for further proceedings. (Pet. App. 15a).

SUMMARY OF ARGUMENT

The Montana Supreme Court was incorrect in holding that revocation of probation based upon a probationer's refusal to admit to sexual assault in a sex offender treatment program required as a condition of probation was a penalty for the exercise of the probationer's Fifth Amendment rights. First, the context of the required admission did not reflect an attempt by the State of Montana to use the threat of probation revocation as a means to compel the respondent to incriminate himself in criminal proceedings. The essential purpose of the Fifth Amendment right is to guard against abuse of official power that unfairly shifts to the individual the government's burden of independent investigation. That purpose is not advanced when the right is held to apply in a context where there is an absence of official abuse.

Second, the State of Montana had a valid reason to insist upon compliance with treatment objectives because of the special needs of probation. Probation is a civil process, not a criminal process. Inquiry in a probation context does not constitute compulsion and, hence, change in the nature of supervision based on the probationer's responses may not be construed as a penalty for claiming a Fifth Amendment right. Moreover, the interests of effective probation supervision are undermined by the requirement that a state must adhere to the standards and protections of the criminal process.

Third, a required admission of potentially criminal conduct is a critical first step in addressing deviant risk behavior in a sex offender treatment program. In the absence of an admission of responsibility, there is no effective means to develop treatment strategies that will assist the respondent in avoiding future deviant conduct.

The application of the Self-Incrimination Clause of the Fifth Amendment to the treatment of sex offenders strikes an inappropriate balance between the hazards of unconstitutional state action and public safety because it penalizes states for adopting treatment strategies that require an admission of responsibility for deviant conduct.

ARGUMENT

THE MONTANA SUPREME COURT ERRED IN RULING THAT A REQUIRED ADMISSION TO SEXUAL ASSAULT IN A TREATMENT PROGRAM REQUIRED AS A CONDITION OF PROBATION AMOUNTED TO COMPULSION UNDER THE FIFTH AMENDMENT

A. Context of the Inquiry

The Fifth Amendment proscribes compulsion not inquiry. *United States v. Washington*, 431 U.S. 181, 187 (1977). A condition precedent to any finding of compulsion is that official action is brought to bear in an attempt to force a person to be a witness against himself in criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Reduced to its simplest terms, the purpose of the Fifth Amendment is to guard against a "tendency in human nature to abuse power." *Ullman v. United States*,

350 U.S. 422, 428 (1956). But it cannot be said that where a state embarks upon the rehabilitation of a person sentenced to probation, valid inquiry by the state in the course of the offender's treatment program must cease if the offender invokes the protections of the Fifth Amendment. Absent a context reflecting an abuse of official power, the Montana Supreme Court was in error holding that the state was penalizing the respondent for not incriminating himself. The court's error was not its recognition that the respondent's responses could be incriminating, but in its assumption that the choice available to the respondent amounted to compulsion.

This Court has made it clear that the Fifth Amendment prohibits compulsion, not the choice presented to the respondent in admitting to misconduct that is the subject of inquiry. *Cf. United States v. Washington*, 431 U.S. at 187; *McGautha v. California*, 402 U.S. 183 (1971). This Court has held that the Constitution "does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' " *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)). Compulsion, therefore, is not measured simply by the theoretical impact of the inquiry. This Court has held that the underlying purposes of the privilege against self-incrimination are implicated only when the official action in question reflects an abuse of power.

This Court has recognized that while the privilege addresses many values, it focuses primarily on the relationship between the government and the individual. It does so in two ways: (1) the prevention of inhumane

treatment of persons who are in possession of information sought by the government, and (2) the advancement of a notion of fairness. *Murphy v. Waterfront Commissioner*, 378 U.S. 52, 57, n.5 (1964). When the state is attempting to whipsaw the information required or needed in criminal proceedings through threatened or actual use of sanctions, these policies are clearly called into question.

This Court's ruling in *Lefkowitz v. Turley*, 414 U.S. at 78-79, is instructive on this point. The Court noted that while the Fifth Amendment provides that no person shall be compelled to be a witness against himself where the state is seeking information to be used in subsequent criminal proceedings. The Court accordingly ruled that the State could not compel testimony for use in grand jury proceedings by demanding waivers of immunity under threat of disqualification as public contractors. The penalty, in effect, arose from the context of state action. Similarly, the Court held in *Gardner v. Broderick*, 392 U.S. 273 (1968), that a public officer could not be discharged for refusing to sign a waiver of immunity after being subpoenaed by a grand jury and explained:

> It is clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust.

See Id. at 279.

Likewise, in *Sanitation Men v. Sanitation Commissioner*, 392 U.S. 280 (1968), the pending criminal investigation before a grand jury for three of twelve city employees undercut any claim that the city's investigation of abuse

in the Department of Sanitation and the subsequent questioning of the employees was solely in furtherance of a non-criminal objective. The Court emphasized:

> [I]t was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which could be used to prosecute them criminally despite the constitutional prohibition.

See Id. at 284. Clearly, compulsion arises in any context that demonstrates that official inquiry is intended to overcome free will to the benefit of a state criminal proceeding. But this Court has not taken the extra step implicit in the decision by the Montana Supreme Court that the privilege will forestall relevant state inquiry in the absence of compulsion.

This Court has not denied a state the ability to conduct relevant inquiry and to take appropriate action in the face of an individual's refusal to cooperate in that inquiry. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). So long as the state does not condition the exercise of its powers upon the relinquishment of the individual's privilege against self-incrimination in a criminal proceeding, the state may insist upon an accounting of public trust. *Minnesota v. Murphy*, 465 U.S. 420, 436, n.7 (1984); *Sanitation Men v. Sanitation Comm'r.* 392 U.S. at 284. The decisions pertaining to the interplay between the Fifth Amendment privilege and the state's attempt to pursue a valid inquiry have been characterized as both a "limit and a grant of power"[1] upon state action. In short,

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[1] *Asherman v. Meachum*, No. 90-2530, slip op. at 1691 (2d Cir. Feb. 13, 1992) (en banc). In *Asherman* the offender had been

(Continued on following page)

the State may pursue legitimate official inquiry, but it may not use the process of inquiry to force information from the lips of individuals in an attempt to prosecute them criminally.

The Montana Supreme Court failed to analyze the context of the State's inquiry, focusing entirely on speculative and theoretical implications of an admission by the respondent. But as discussed above, a determination of whether a state is exceeding its grant of power in pursuing a valid state interest primarily entails an examination of the context of state action.

This Court has not overlooked the contextual framework in determining if a state's inquiry amounts to compulsion for Fifth Amendment purposes. The Court's ruling in *Baxter v. Palmigiano*, 425 U.S. 308 (1976) exemplifies this point. Faced with a choice between fashioning a remedy along the lines of the *Gardner-Lefkowitz* group of decisions on one hand or one that deferred to the operational and practical considerations of maintaining discipline in prisons on the other, the Court let stand a Rhode Island prison procedure that permitted an inmate to

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(Continued from previous page)

sentenced to incarceration for manslaughter and was subsequently placed in a halfway house. When his parole was denied, the State ordered him to report for a psychiatric examination out of concern for his potential behavior and state of mind. Asherman refused upon advice of counsel. The State then returned him to confinement. The Second Circuit held that irrespective of his pending federal habeas corpus petition challenging the conviction, the State could terminate Asherman's home release status upon his refusal to answer questions about his crime. *Id.* at 1693.

remain silent at a disciplinary hearing, but permitted staff to draw an inference of guilt from his silence. The Court noted that Rhode Island prison authorities did not seek to make evidentiary use of the inmate's refusal to testify. The Court further observed that no criminal proceedings were pending when Palmigiano was provided the opportunity to testify. Although Justice Brennan's dissent underscored that the potential for evidentiary use of Palmigiano's statements in a criminal proceeding was present, the majority concluded that the state was not unfairly pitting its powers against the individual in an effort to avoid the burdens of independent investigation. The majority in *Baxter* reasoned:

> This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege.

See Id. at 318.

Prohibited compulsion of speech should not focus on the theoretical implications of the responses. Yet, even in terms of the impact of any responses, this Court has repeatedly held that the Fifth Amendment privilege has no application where there is no realistic threat of a criminal proceeding. *Minnesota v. Murphy*, 465 U.S. at 435, n. 7. In short, the context of state action must include an assessment of the reality of state use of incriminating information at a criminal proceeding. No such assessment was made by the Montana Supreme Court.

The Montana Supreme Court's error was that it mischaracterized the sought-after admission of sexual assault as compulsion and vacated the respondent's resulting sentence of incarceration. The relief that the Montana

Supreme Court fashioned was not based upon the likelihood of criminal prosecution but the certainty of administrative action. In the absence of a context from which an intent to compel testimony could be made, the Court nonetheless treated the state's action as a penalty for invoking the privilege. While this broad and entirely unnecessary prohibition of valid state action does little to advance the purposes of the Fifth Amendment, it does force the State of Montana to abandon treatment in a community setting. It is highly questionable that this set of circumstances strikes an appropriate balance between the hazards of unconstitutional state action and the protection of other important values such as public safety and successful treatment of sentenced offenders.

B. Probation as a Civil Process

The Montana Supreme Court does not indicate whether it accorded any importance to the fact that the respondent was on probation. But in assessing whether the state proceedings in question implicate the Fifth Amendment's guarantee against compulsory self-incrimination, there must be an examination of the civil or criminal nature of the proceedings at issue. *Allen v. Illinois*, 478 U.S. 364 (1986).

It is clear under prior decisions by this Court that probation is essentially civil in nature. In *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987), this Court remarked that probation serves as a period of genuine rehabilitation. This Court also observed that while probation is a form of criminal sanction imposed by a Court after conviction, it

retains more of the characteristics of a civil proceeding than a criminal one. Clearly, revocation of probation is not part of criminal prosecution. *Gagnon v. Scarpelli*, 411 U.S. 781 (1973). Even though probationers risk incarceration when confronted with a charge of violating a condition of probation, that possibility does not per se mandate the application of the Sixth Amendment's right to counsel and confrontation to the degree of a defendant in a criminal proceeding. Likewise, a probationer under supervision in the community is not entitled to the same rights of privacy under the Fourth Amendment as enjoyed by unconvicted citizens. *Griffin v. Wisconsin*, 483 U.S. at 875. The special needs of the state in protecting the public from sentenced offenders under supervision in the community justify departure from the usual warrant and probable cause requirements. As the Court in *Griffin v. Wisconsin* explained:

> In such circumstances it is both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability of particular items of supporting data, and upon the same degree of certainty of violation, as is required in other contexts.

See Id. at 879.[2]

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[2] Analogously, the Court has ruled that regulations impinging on the constitutional rights of inmates are themselves constitutional so long as they are reasonably related to legitimate penological interests. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

Given the essentially civil nature of probation and the strong rehabilitation purposes probation serves, the possible criminal implications of the respondent's admission does not implicate the Self-Incrimination Clause of the Fifth Amendment. This Court noted in *Allen v. Illinois*, 478 U.S. at 370, 375, that inclusion of the Fifth Amendment in state proceedings that deal with sexually dangerous persons did not serve the underlying purposes of the privilege because the express policy of the Illinois legislation[3] is to address treatment not the traditional aims of punishment peculiar to criminal proceedings. The essential purposes to be served by relevant inquiry in probation supervision are functionally indistinguishable from the benign purposes addressed by the Illinois legislation. That inquiry requires the supervising officials to know where the probationer is living, his occupation, life habits, personal associations, and whether the probationer is in compliance with the criminal laws. This necessitates a degree of intrusion that is peculiar to probation and entirely unlike the relationship between the state and its citizens. The inquiry is not designed to enhance enforcement of the laws of the state, but to "' help individuals reintegrate into society as constructive individuals as soon as they are able . . . ' ". *Gagnon v. Scarpelli*, 411 U.S. at 783 (quoting *Morrissey v. Brewer*, 408 U.S. 471 at 477 (1972)).

Moreover, the practical difficulties and delays inherent in the grants of testimonial or use immunities[4] by state officials would unduly impact on the effective supervision of probationers. Cf. *Griffin v. Wisconsin*, 483

U.S. at 879 (warrant requirement for searches of probationers would reduce deterrent effect of effective supervision). But more importantly, aside from these pragmatic considerations it makes little sense to superimpose a Fifth Amendment protection where the state's express intent is to use the results of the inquiry solely to enforce the conditions of probation.

C. The Need For Treatment

Although it is clear that treatment considerations were entirely the focus of the State of Montana's requirement for an admission of sexual assault, the Montana Supreme Court failed to analyze the treatment context of the sought-after admission of the respondent. By so doing it disregarded entirely the state's express interest in treating a convicted sex offender. That court's failure to recognize the necessity for offenders to admit to the acts for which they have been convicted nullifies an acceptable

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[3] Illinois Sexually Dangerous Persons Act, Ill. Rev. Stat., Ch. 38, Paras. 105-1 - 105-12 (1985).

[4] See e.g., *Kastigar v. United States*, 406 U.S. 441, 461-462 (1972) (United States can compel testimony from witness who invokes Fifth amendment by conferring testimonial immunity).

treatment methodology for sex offenders[5] and potentially places state citizens at additional risk.

In a larger context, the decision by the Montana Supreme Court strikes at the concept of federalism acknowledged by this Court in *Allen v. Illinois*, 478 U.S. at 364. Without an effective and valid means of treating convicted sex offenders, the state would be forced to either incarcerate all sex offenders in order to provide a setting that guarantees public safety or permit untreated sentenced offenders to remain in the community in probation status. If the essence of federalism is freedom to develop solutions to contemporary problems, that purpose is not served by the rigid application of constitutional protections that address different concerns. Inasmuch as the Fifth Amendment provides a barrier to a state procedure characteristic of an inquisitorial system,

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[5] Admission of the deviant criminal act is recognized as the basis for successful sex offender treatment.

> Regardless of the form that denial takes, treatment for a propensity toward sexual aggression cannot take place until the offender at least acknowledges that the abuse occurred. An individual cannot be helped to deal with a problem until he admits one exists. Therefore, gaining the offender's admission is necessary if an adequate clinical interview is to proceed.

W.D. Pithers, L.S. Beal, J. Armstrong, J. Petty, *Identification of Risk Factors Through Clinical Interviews and Analysis of Records*, in *Relapse Prevention with Sex Offenders*, (D. Laws, ed. 1989), at 83.

the application of the Fifth Amendment in a purely treatment context threatens to displace a scientifically acceptable method of rehabilitation.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

JEFFREY L. AMESTOY
State of Vermont

DONAL F. HARTMAN, JR.
Assistant Attorney General
Pavilion Building
Montpelier, Vermont 05602
(802) 828-3171
(802) 241-2288

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Supreme Court, U.S.
FILED
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No. 91-687

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ of Certiorari To The Montana Supreme Court

RESPONSE TO SUPPLEMENTAL BRIEF

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

BEST AVAILABLE COPY

THE DRUMMOND CASES ARE NOT APPLICABLE TO MONTANA v. IMLAY.

In his Supplemental Brief, the respondent refers to two cases recently decided in state district court, in an attempt to show what might have happened to Imlay had he admitted in therapy that he committed the crime of which he was already convicted. State v. Drummond, Montana Fifth Judicial District Court, Jefferson County, Cause Nos. 1364 and 1365. The Drummond cases are inapplicable and irrelevant to the Imlay case. Further, the cases are not final. Judgment issued very recently in these cases, with Drummond reserving the right to appeal certain issues. See App. 37a. Cases that are not final can hardly be considered "intervening authority" as described by Sup. Ct. R. 25.5.

There are three separate criminal cases involving Mr. Drummond. Mr. Drummond was first convicted on a guilty plea of sexual intercourse without consent of a severely mentally disabled woman who was a resident at the Montana Developmental Center, a state hospital where Drummond was an employee. See "Findings of Fact, Conclusions of Law, Judgment & Sentence," Montana Fifth Judicial District Court, Jefferson County Cause No. 1252 (App. 1a-7a). Drummond was sentenced to 20 years in prison with the recommendation that he not be eligible for parole until he had completed the prison's sex offender program. (App. 4a).

Drummond was later charged with the sexual assault of a child, and, in the alternative, incest. (App. 12a). After Drummond had been sent to prison for the rape of the resident at the Montana Developmental Center, the child told her therapist that Drummond had sexually assaulted her. See paras. 3 and 5, Motion for Leave to File Information, App. 10a. The Montana Department of

Family Services investigated the child's statements and obtained from Drummond a written release of all medical and psychological records at the prison. See "Release Form," App. 16a. After the release form had been signed and during an interview with two social workers at which Drummond's therapist was present, Drummond admitted to sexually assaulting the child. App. 11a. Drummond has recently entered a plea of guilty to the crime. App. 20a.

The Drummond sexual assault case is distinctly different from any hypothetical scenario posited by respondent concerning Imlay. Drummond had already pled guilty to the earlier rape. Drummond signed a release of all his medical records at the prison. Drummond's confession to the social workers did not occur during the regular course of sex offender therapy at the prison. Drummond's confession did not relate to the crime of which he was already convicted, but to a separate unrelated crime.

The legal issue in Montana v. Imlay concerns only statements relating to the crime for which Imlay has already been convicted. The issue of whether the Fifth Amendment privilege against self-incrimination is implicated when a defendant is asked to reveal uncharged criminal conduct during sex offender therapy is not before this Court.[1]

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[1]This is a legal issue that has engendered much debate in the context of the application of United States Sentencing Guideline § 3E1.1, because the guideline allows credit for "acceptance of responsibility for his [the defendant's] criminal conduct." There is a conflict among the circuit courts as to whether the Fifth Amendment privilege is implicated when a defendant accepts responsibility for all criminal conduct, including uncharged conduct. See, e.g., United States v. O'Neil, 936 F.2d

Respondent also refers to a perjury charge brought against Drummond. Drummond was charged with perjury because he made two inconsistent statements in court and under oath. App. 30a-31a. At the sentencing hearing on the rape charge, Drummond had stated under oath that the rape was the only incident of sexual misconduct by him at the Montana Developmental Center. App. 30a. The parents of the victim later sued the State of Montana for damages arising out of the rape. At the trial on the civil suit, Drummond testified that he had sexually assaulted the victim a number of times prior to raping her and that he had sexually assaulted other residents of the Center. App. 31a. Drummond has also recently pled guilty to the perjury charge. App. 34a.

With respect to the perjury charge, the differences between the Drummond case and the Imlay case are readily apparent. Drummond made two contradictory sworn statements under oath and thus committed perjury. Imlay's statements, had he made them, would have been during therapy. See Mont. Code Ann. § 45-7-201(6).[2] Statements made in therapy are not sworn statements, nor

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599 (1st Cir. 1991) (recognizing controversy over whether § 3E1.1 encompasses conduct other than that for which a defendant has already been convicted); see also Pet. Brief at 35-36.

[2]Mont. Code Ann. § 45-7-201(6) provides:

> Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

are such statements by themselves proof of perjury.[3] Under State v. Thiel, 768 P.2d 343 (Mont. 1989), fundamental fairness would prohibit a prosecution for perjury based solely upon statements made in therapy. Even if such a prosecution were allowed, it is well settled that the Fifth Amendment privilege does not protect perjury. See Pet. Br. at 21, n.16.

Thus, nothing respondent has suggested in his Supplemental Brief makes a prosecution for perjury any more realistic or probable. The threat of perjury has been set up by respondent as a red herring, designed to draw this Court's attention away from the fundamental constitutional considerations that control this case. Regardless of the hypothetical incriminating effect of statements made in therapy, the critical questions remain as to whether Mr. Imlay was penalized for a valid invocation of his Fifth Amendment privilege when his probation was revoked and whether the Fifth Amendment privilege should be used to deny the benefit of outpatient therapy in a community-based setting.

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[3]Respondent has never recognized the high and strict standards that control a perjury prosecution. Mont. Code Ann. § 45-7-201(7) expressly provides that "[n]o person shall be convicted of an offense under this section where proof of falsity rests solely upon the testimony of a single person other than the defendant." The proof of perjury must be more than the contradiction testimony of a person other than the defendant. See also State v. Scanlon, 569 P.2d 368, 378 (Mont. 1977). Further, indirect or circumstantial evidence, such as the testimony of a therapist concerning a statement a defendant had made in therapy contradicting a sworn statement, would not by itself be proof of perjury. Id. at 382.

For the foregoing reasons, the State of Montana asks this Court to disregard the information in the Supplemental Brief filed by the respondent.

MARC RACICOT
Attorney General
ELIZABETH L. GRIFFING*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

September 1992

APPENDIX

APPENDIX

Item		Page
1.	Findings of Fact, Conclusions of Law, Judgment & Sentence	1a
2.	Motion for Leave to File Information and Affidavit in Support Thereof (Cause No. 1365)	8a
3.	Information (Cause No. 1365)	12a
4.	Release Form	16a
5.	Motion for Protective Order Preventing Psychologist from Testifying	17a
6.	Minute Entry or Notice of Ruling (Cause No. 1365)	20a
7.	Motion for Leave to File Information and Affidavit in Suppport Thereof (Cause No. 1364)	22a
8.	Information (Cause No. 1364)	29a
9.	Minute Entry or Notice of Ruling (Cause No. 1364)	34a
10.	Findings of Fact, Judgment & Sentence (Cause Nos. 1364 & 1365)	37a

MONTANA FIFTH JUDICIAL DISTRICT COURT

JEFFERSON COUNTY

THE STATE OF MONTANA, Plaintiff, vs. LLOYD DEAN DRUMMOND, Defendant.	)	Cause No. 1252 **FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT & SENTENCE**

A sentencing hearing was held in this cause on October 11, 1989. Evidence, both oral and documentary, was received, and recommendations for a sentence were proposed.

The Court now having considered all relevant factors, including the nature and circumstances of the charges, the presentence report, the psychological evaluations, the respective recommendations, the Defendant's voluntary plea and the judically accepted sentencing criteria, does now make its:

FINDINGS OF FACT

1. On August 9, 1989, the Defendant, LLOYD DEAN DRUMMOND, appeared in Court with counsel and withdrew a previously entered plea of not guilty and entered a voluntary plea of GUILTY to the charge set out in the Information, which plea was by the Court accepted.

2. The ordered presentence report indicates that the Defendant has one previous felony conviction for mail fraud and served time in a Federal prison. He also had a number of misdemeanor convictions for shoplifting, larceny and theft.

3. The Defendant's own version of the incident as given to the probation officers:

> "On 7-9-88, I worked an overtime shift at M.D.C. from 10:00 p.m. to 6:00 a.m. following my normal shift of 2:00 p.m. to 10 p.m. Shortly after midnight I heard a noise coming from the girls room. Upon investigating I noticed Gretta standing in the doorway of the bedroom by the bathroom. I told her to go back to bed. She went and stood by the bed so I said for her to get in the bed and get back to sleep. I started for the bedroom door and turned around to check on her before going out. She was lying on her back with her nightgown up above her hips and her legs apart. I looked at her and closed the door and went over and had sexual intercourse with her. She didn't seem upset or didn't try to push

me away. I got up, covered her with her blanket and went back out to the day hall."

/s/ L. Dean Drummond

The Defendant gave substantially the same version of the incident to the personnel of the Sexual Assault Treatment Program of Mental Health Services, Inc. who he retained for an evaluation at his expense; although in the latter report he attempts to minimize his involvement by suggesting the victim consented by her actions.

4. At the time of the incident, Defendant was an employee at the Montana Developmental Center and the victim was a 41 year old profoundly retarded resident of the institution. She was and is nonverbal and incapable of giving consent. The victim became pregnant as a result of the incident and subsequently gave birth to a child. The Mental Health Services' evaluation found little or no remorse on the part of the Defendant, as does this Court.

The Mental Health Services' evaluation indicated that the Defendant may have been involved in numerous other illegal sexual behaviors, not only with the victim in this case but with others similarly situated. The evidence adduced at the sentencing hearing seems to confirm this conclusion. The Defendant admitted that he needed treatment and the report indicated he was motivated for same. The report strongly recommended inpatient treatment, but that he be held accountable for his actions in this case.

5. The Defendant is indigent, is married and has three minor children. The only practical facility for the

treatment of Defendant's admitted problem is the Sex Offender Program at the Montana State Prison.

From the foregoing Findings of Fact, the Court now makes its:

CONCLUSIONS OF LAW

The Defendant, LLOYD DEAN DRUMMOND, is GUILTY of the crime of SEXUAL INTERCOURSE WITHOUT CONSENT, a Felony, as specified in § 45-5-503, MCA. There are no mitigating circumstances. Accordingly, the Court now enters its:

JUDGMENT & SENTENCE

I

The Defendant is GUILTY of the offense as set out in the Information.

II

That for LLOYD DEAN DRUMMOND's conviction as aforesaid, he is hereby sentenced to a term of twenty years in the Montana State Prison.

III

Upon Defendant's incarceration, he shall enroll, as soon as possible, in the prison's Sex Offender Program and he shall not be considered eligible for parole until he shall have satisfactorily completed that program.

IV

The Defendant is certified as "non-dangerous" for purposes of parole eligibility.

V

The Defendant is remanded to the Sheriff of this county who shall execute the terms of this sentence by delivering the Defendant to the Montana State Prison.

DATED THIS 18th day of October, 1989.

/s/ FRANK M. DAVIS
District Judge

REASONS FOR SENTENCE

The Court has imposed the maximum sentence allowable and would have increased it, had it the power to so do. The Defendant's offense was against a profoundly retarded victim, mentally and physically incapable of consenting or resisting. The offense is compounded by the fact that he was entrusted and charged with the responsibility for the immediate institutional care of a helpless "Child of a Lesser God". To characterize his act as outrageous is an understatement. The crime would have gone undetected had not the victim become pregnant.

The Court finds no mitigating circumstances, except the minor one of an admission that he is a sex offender and in need of treatment. This concession was only after he was caught.

Accordingly, LLOYD DEAN DRUMMOND must be punished and at least for a time removed from the society against whom he has transgressed. Hopefully, this punishment will not only act as a deterrence to Defendant, it will be a message to other potential offenders and particularly to the employees of our State health care institutions who may be tempted, as was Defendant, to violate their trust.

The Court recognizes that one of the principles of sentencing is the concept of rehabilitation. If there is any hope of rehabilitation for this Defendant, it is in a place of total confinement. That is not only the Court's opinion, it is the opinion of his own evaluators. Under the circumstances of this case, the Montana State Prison is the only viable alternative.

The Court has considered the impact of the offense on the helpless victim, her family, the Defendant's fellow employees at the Montana Developmental Center and, indeed, the community of Boulder. That impact has been a traumatic and devastating one. The emotional scars on the victim's distraught family is [sic] perhaps irreparable. They can only take some solace in the fact that the sentence assures that he will not soon offend again.

The Court has considered the impact of a prison sentence on Defendant's own unfortunate family, but notes persuasive unrebutted testimony to the effect the wife and three children actually seemed more secure and happy when Defendant was absent from the home.

DATED THIS 18th day of October, 1989.

/S/ FRANK M. DAVIS
District Judge

cc: Richard J. Llewellyn
Joseph R. Massman
Jefferson County Sheriff
Montana State Prison
Lloyd Dean Drummond
James Wright

RICHARD J. LLEWELLYN
Jefferson County Attorney
Courthouse, P.O. Box H
Boulder, Montana 59632
(406) 225-4251 ext. 57

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA, Plaintiff, v. LLOYD DEAN DRUMMOND, Defendant.	Cause No. 1365 **MOTION FOR LEAVE TO FILE INFORMATION AND AFFIDAVIT IN SUPPORT THEREOF**

MOTION

COMES NOW Richard J. Llewellyn, Jefferson County Attorney, and moves this Court for leave to file an Information charging the above-named Defendant, LLOYD DEAN DRUMMOND, with committing the criminal offenses of SEXUAL ASSAULT, a felony, in violation of Section 45-5-502, MCA, or, in the alternative, INCEST, a felony, in violation of Section 45-5-507, MCA.

This motion is made on the grounds and for the reasons set forth in the accompanying Affidavit filed in support hereof.

DATED this 29th day of January, 1992.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Jefferson)

COMES NOW Richard J. Llewellyn and, being first duly sworn, deposes and upon his oath states that:

1. Affiant is the duly elected, qualified and authorized County Attorney for Jefferson County, Montana. He makes this Affidavit, in his said capacity, in support of the foregoing Motion for Leave to File Information.

2. Affiant has interviewed Cherrill Rolfe (a social worker with the Montana Department of Family Services), Don Ferriter (a social worker with the Montana Department of Family Services), Barbara Howe (a child psychologist practicing in Helena, Montana, who counsels Jane Doe), and Sharon Miller. Affiant has also reviewed various investigative reports, prepared by DFS social workers, all pertaining to the events hereinafter described. On the basis of all such interviews and investigative reports, Affiant makes the allegations hereinafter set forth.

3. Jane Doe is a female descendant of Lloyd Dean Drummond. During the first ten months in 1989, between January 1 and October 11 of that year, Jane Doe was under the age of fourteen (14) years. Both she and Drummond resided in the Drummond family home, and she was in frequent contact with Drummond.

4. In early 1989, Drummond was charged with raping a profoundly retarded resident of the Montana Developmental Center. (While the case was pending, he had been released to the "custody" of a local Boulder minister, and he resided in his family home.) Drummond ultimately entered a plea of "guilty" to the charge and, on October 11, 1989, was sentenced to the Montana State Prison.

5. Between approximately October of 1991 and January of 1992, Jane Doe advised several persons that she had been sexually abused by Drummond. According to Jane Doe, Drummond had sexually assaulted her (by touching her "private parts" so that they "hurt") on numerous occasions between approximately January 1 and October 11, 1989. These persons included Barbara Howe (Jane Doe's counselor) and Sharon Miller.

6. As a convicted sex offender, Drummond was required to participate in a sex offender program at the Montana State Prison. During the course of such program, Drummond admitted to having sexually abused Jane Doe. This information was communicated by prison officials to the Montana Department of Family Services, in accordance with the applicable Montana law requiring the reporting of child abuse information.

7. On December 23, 1991, Drummond was interviewed by Don Ferriter, a child protective services social worker with the Department of Family Services. The interview was conducted in the presence of Pennie Lundstrom (also a DFS social worker) and Tim Hamm (a prison "therapist"). In the course of the interview, Drummond stated that, after approximately December of 1988, he had begun a sexually-oriented "grooming" process with Jane Doe. (Drummond stated that he was "attracted" and sexually "aroused" by Jane Doe's presence.) According to Drummond, this "grooming" process was intended to gratify him sexually, as his employment at the Montana Developmental Center had been terminated so that he no longer had "sexual" access to the institution's residents, and such conduct was apparently intended to ultimately prepare Jane Doe for an act of sexual intercourse with Drummond. According to Drummond, he touched Jane Doe "in the crotch" twenty (20) to thirty (30) times during a period of approximately six (6) to ten (10) months.

6. Further, Affiant sayeth naught.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

SUBSCRIBED AND SWORN TO before me this 29th day of January, 1992.

(NOTARIAL SEAL)

/s/ Cheri L. Kramer
Notary Public, State of Montana
Residing at: East Helena
My Commission expires: 1/25/95

RICHARD J. LLEWELLYN
Jefferson County Attorney
Courthouse, P.O. Box H
Boulder, Montana 59632
(406) 225-4251 ext. 57

MONTANA FIFTH JUDICIAL DISTRICT COURT,
JEFFERSON COUNTY

STATE OF MONTANA,	)	Cause No. 1365
	)	
Plaintiff,	)	**INFORMATION**
	)	
v.	)	
	)	
LLOYD DEAN DRUMMOND,	)	
	)	
Defendant.	)	
	)	
STATE OF MONTANA	)	
	:	ss.
County of Jefferson	)	

Richard J. Llewellyn, Jefferson County Attorney, being first duly sworn, deposes and upon his oath says that the above-named Defendant, LLOYD DEAN DRUMMOND, has committed the following criminal offenses:

(a) SEXUAL ASSAULT, a felony, in violation of Section 45-5-502, MCA, as alleged in Count I hereof; or, in the alternative,

(b) INCEST, a felony, in violation of Section 45-5-502, MCA, as alleged in Count II hereof.

The offense of SEXUAL ASSAULT, a felony, is punishable by imprisonment in the Montana State Prison for a term, of not less than two (2) years or more than twenty (20) years and may also be punishable by a fine in an amount not exceeding $50,000 in addition to the specified prison term. The offense of INCEST, a felony, is punishable by imprisonment in the Montana State Prison for a term not exceeding twenty (20) years and/or by a fine not exceeding $50,000.

The facts constituting the said offenses are as follows:

COUNT I
(Sexual Assault)

The Defendant, LLOYD DEAN DRUMMOND, on repeated occasions between approximately January 1 and October 11, 1989, at Boulder, within Jefferson County, Montana, knowingly subjected Jane Doe to sexual contact without consent by touching or fondling her genitals, genital area, and/or "crotch" area; at such time, Jane Doe was a female child less than fourteen (14) years old, was not the Defendant's spouse and was unable to consent to any such acts by the Defendant because of her age, and the Defendant was three (3) or more years older than Jane Doe;

With the above-described conduct of the Defendant being in violation of Section 45-5-502, MCA, and constituting the criminal offense of SEXUAL ASSAULT, a felony; or,

COUNT II
(Incest)

As a different and alternative statement of the same offense alleged in Count I hereof,

The Defendant, LLOYD DEAN DRUMMOND, on repeated occasions between approximately January 1 and October 11, 1989, at Boulder, within Jefferson County, Montana, knowingly had sexual contact with Jane Doe, a female descendent, by touching or fondling her genitals, genital area, and/or "crotch" area; at such time, Jane Doe was under sixteen (16) years of age, and the Defendant was three (3) or more years older than Jane Doe;

With the above-described conduct of the Defendant being in violation of Section 45-5-507, MCA, and constituting the criminal offense of INCEST, a felony.

A list of possible witnesses for the State of Montana, now known to the prosecution, is as follows:

Jane Doe Montana City, MT	Sharon Miller Montana City, MT
Barbara Howe Helena, MT	Cherrill Rolfe Helena, MT
Don Ferriter Helena, MT	Pennie Lundstrom Butte, MT
Tim Hamm Deer Lodge, MT	Tom Dawson Boulder, MT

DATED this 29th day of January, 1992.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

SUBSCRIBED AND SWORN TO before me this 29th day of January, 1992.

/s/ Cheri L. Kramer
(NOTARIAL SEAL) Notary Public, State of Montana
Residing at: East Helena
My Commission Expires: 1/25/95

LEWIS AND CLARK COUNTY
DEPARTMENT OF FAMILY SERVICES
316 N. Park, Box 817
Helena, MT 59624

RELEASE FORM

Permission is hereby granted for Lewis and Clark County Department of Family Services to release/obtain medical, psychological, social, psychiatric and/or other relevant information from/to:

Montana State Prison*
Address: 700 Conley Lake Rd.
Deer Lodge, MT 59722

pertaining to the records of: Lloyd Dean Drummond
Signature: /s/ L. Dean Drummond

Address: 700 Conley Lake Road

Deer Lodge, Mt. 59722

Relationship (if signed by someone other than client):

_____

Date: 11-26, 19 91.

*The blanks are completed in handwriting in the original form.

JOSEPH R. MASSMAN
Massman Law Firm
Suite 3C, Arcade Building
111 North Last Chance Gulch
P.O. Box 804
Helena, Montana 59601
(406) 442-2111

Attorney for Defendant

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

* * * * * * * * *

STATE OF MONTANA,	)	Cause No. 1365
	)	
Plaintiff,	)	MOTION FOR
	)	PROTECTIVE ORDER
LLOYD DEAN	)	PREVENTING
DRUMMOND,	)	PSYCHOLOGIST
	)	FROM TESTIFYING
Defendant.	)	

* * * * * * * * *

COMES NOW the Defendant, Lloyd Dean Drummond, by and through his counsel of record, and respectfully moves the Court for a protective order disallowing any testimony by any MSP staff psychologist involved in the Sexual Offender Treatment Program at the trial of Defendant Drummond in the above entitled case.

MCA 26-1-807 provides that the confidential relations and communications between a psychologist and his client shall be placed on the same basis as provided by law for those between an attorney and his client.

Defendant Drummond was sentenced by this Court to the certainly far reaching [sic] when one considers the net affect [sic] they will have on present and future Court ordered participants in sexual offender treatment programs at MSP or elsewhere. Defendants will be placed in the "Catch 22" situation that they cannot achieve probation or parole without participation but participation and disclosure will potentially result in additional charges and additional sentences.

WHEREFORE, Defendant Drummond respectfully requests a Protective Order from this Court preventing any psychologist with whom Defendant Drummond had a doctor/patient relationship from testifying in any manner whatsoever in the above entitled case. This prohibition from testimony should also extend to facts and information which originated with Defendant Drummond's own psychologist but were passed on to other individuals.

DATED this 18 day of June, 1992.

/s/ Joseph R. Massman
Joseph R. Massman

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was mailed postage fully prepaid by United States mail on the 18 day of June, 1992, and addressed to the following:

Richard Llewellyn
Jefferson County Attorney
Courthouse, P.O. Box H
Boulder, Montana 59632

/s/ Joseph R. Massman

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA,	)	Cause No. 1365
	)	
Plaintiff,	)	**MINUTE ENTRY OR**
vs.	)	**NOTICE OF RULING**
	)	Dated July 22, 1992
LLOYD DEAN	)	Before Hon. FRANK M.
DRUMMOND,	)	DAVIS
	)	Court Reporter
Defendant.	)	Julie Misemer
	)	Clerk Marilyn J. Stevens
	)	Recorded Doc. CME1

Defendant's request for Change of Plea hearing came on this day with Defendant present in custody of Sheriff and with Public Defender, Joseph R. Massman. State of Montana was represented by Jefferson County Attorney, Richard J. Llewellyn.

State advised that no plea negotitions [sic] had taken place but Defendant requested no further prosecutions be filed; State would not prosecute if all sexual offenses against Montana Developmental Center residents were provided to the State in writing and these offenses would not be prosecuted.

Mr. Massman agreed with State that no negotions [sic] had been made; that an updated Pre-Sentence Investigation would be requested and each counsel would give a separate recommendation for sentencing.

Court determined that Defendant's name was true; that he had received the Information and reading thereof was waived; charges and punishment therefor were advised and Defendant had sufficient time to talk with counsel regarding the case. Defendant requested to withdraw his former plea of Not Guilty. No plea bargain had been discussed and Court would not be bound by plea negotiations. After fully advising Defendant of his rights, Court allowed the Defendant to withdraw his former plea of Not Guilty and Defendant then plead [sic] "GUILTY". State requested clarification on which Count Defendant was pleading to since the charges were in the alternative. Mr. Massman advised that Defendant was pleading Guilty to Count I, Sexual Assault.

Court accepted Defendant's Plea of Guilty to Sexual Assault, in open Court with Defendant's counsel present, Defendant having been advised of his rights, understanding them and waiving them.

Counsel requested an up-dated Pre-Sentence Investigation to cover this case as well as Cause #1364 so when Pre-sentence Investigation and Report is received, both causes can be set for sentencing at the same time. Mr. Massman will consult with Jim Wright who is preparing the Pre-Sentence.

RICHARD J. LLEWELLYN
Jefferson County Attorney
Courthouse, P.O. Box H
Boulder, Montana 59632
(406) 225-4251 ext. 57

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA, Plaintiff, v. LLOYD DEAN DRUMMOND, Defendant.	)	Cause No. 1364 **MOTION FOR LEAVE TO FILE INFORMATION AND AFFIDAVIT IN SUPPORT THEREOF**

MOTION

COMES NOW Richard J. Llewellyn, Jefferson County Attorney, and moves this Court for leave to file an Information charging the above-named Defendant, LLOYD DEAN DRUMMOND, with committing the criminal offense of PERJURY, a felony, in violation of Section 45-7-201, MCA, and as alleged in the alternative in the proposed Information filed herewith.

This motion is made on the grounds and for the reasons set forth in the accompanying Affidavit filed in support hereof.

DATED this 29th day of January, 1992.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Jefferson)

COMES NOW Richard J. Llewellyn and, being first duly sworn, deposes and upon his oath states that:

1. Affiant is the duly elected, qualified and authorized County Attorney for Jefferson County, Montana. He makes this Affidavit, in his said capacity, in support of the foregoing Motion for Leave to File Information.

2. Affiant has interviewed Steve Sparhawk (a Criminal Investigator with the Montana Attorney General's Office), Tim Campbell (Undersheriff of Jefferson County), Jim Obie (attorney for the Montana Department of Corrections and Human Services), Curt Drake (a Helena attorney who represented the State of Montana in McGuire v. State of Montana, et al., Cause No. 88-C-459 before the Montana Second Judicial District Court, Silver

Bow County), Cherrill Rolfe (a social worker with the Montana Department of Family Services), Don Ferriter (a social worker with the Montana Department of Family Services), Barbara Howe (a child psychologist practicing in Helena, Montana, who counsels Jane Doe), and others. Affiant prosecuted the case of State v. Lloyd Dean Drummond, Cause No. 1252 before this District Court, in which Lloyd Dean Drummond was prosecuted, convicted and sentenced for committing the offense of Sexual Intercourse Without Consent, a felony, against Margretta Glover, and Affiant is fully familiar with such proceeding. Affiant has obtained a transcript of the sentencing hearing conducted in said proceeding on October 11, 1989. Affiant is further familiar with the said cause of McGuire v. State of Montana, et. al., which was tried in Silver Bow County District Court on or about March 19, 1991. Affiant has obtained, and has reviewed, a transcript of testimony presented by Lloyd Dean Drummond at the trial of said cause. Affiant has further reviewed a large number of investigative reports prepared by various law enforcement officers and DFS social workers, all pertaining to the events hereinafter described. On the basis of all such interviews, proceedings, transcripts, and investigative reports, Affiant makes the allegations hereinafter set forth.

3. Margretta Glover is a profoundly retarded, incapacitated person who, during 1988, was institutionalized at the Montana Development [sic] Center in Boulder, Jefferson County, Montana. During the fall of 1988, it became apparent that Glover was pregnant. By virtue of her profound mental retardation, Glover was incapable of consenting to an act of sexual intercourse.

4. An intensive investigation was thereafter conducted by the Montana Department of Institutions (now the Montana Department of Corrections and Human Services), by investigators with the Criminal Investigation Bureau of the Montana Attorney General's Office, and by officers of the Jefferson County Sheriff's Office.

5. At the conclusion of said investigation, Lloyd Dean Drummond confessed to having sexual intercourse with Glover on one occasion while he was a direct care attendant at the Montana Developmental Center. According to Drummond, he had engaged in sexual intercourse with Glover on only one occasion.

6. Affiant thereafter charged Drummond in this District Court with the offense of Sexual Intercourse Without Consent, a felony, in violation of Section 45-5-503, MCA. Drummond plead [sic] "not guilty" to the charge and, while awaiting trial, he was released to the custody of a local Boulder minister. During the following months, Drummond resided in Boulder, and his status and activities were periodically monitored by law enforcement authorities and by social workers with the Montana Department of Family Services.

7. Drummond appeared before this District Court on August 9, 1989, and withdrew his "not guilty" plea. At such time, he entered a plea of "guilty" to the charge of Sexual Intercourse Without Consent, and the District Court ordered the conduct of pre-sentence investigation. Upon completion of the pre-sentence investigation and the completion of a pre-sentence report, Drummond appeared for sentencing on October 11, 1989. In an attempt to obtain a substantial sentence for Drummond, the State introduced testimony, regarding certain

"aggravating" factors, including testimony alleging that Drummond had been involved in sexual offenses against other MDC residents. In response, Drummond himself took the stand, was duly sworn on oath, was examined by his own attorney, and was cross-examined [by] Affiant.

8. In an attempt to obtain a lenient and/or probationary sentence from the Court, Drummond expressly denied that he had been involved in "sexual misconduct" with any other residents of the Montana Developmental Center. He testified that his rape of Margretta Glover was the "only incident of sexual misconduct" at MDC. Drummond further testified that he had been a "law abiding-citizen" during the approximately ten (10) months between the time he was interviewed by investigators and the date of the sentencing hearing.

9. As the result of the rape of Margretta Glover, her subsequent pregnancy, and the birth of her child, her mother (individually, as Margretta Glover's guardian, and on behalf of her child), sued the State of Montana, the Montana Department of Institutions, the Montana Developmental Center, and Carroll V. South, the Director of said Department. This lawsuit, which sought substantial monetary damages from the Defendant, was tried before the District Court in Silver Bow County during March of 1991. Drummond was called as a witness during said trial. He testified under oath that he had sexually assaulted Margretta Glover, on several occasions and over a period of time, prior to raping her. Drummond further testified that he had raped Glover not only on the one occasion, but on two other occasions as well. Further, Drummond testified that he sexually assaulted, sexually abused, and sexually fondled several other MDC residents.

10. Jane Doe is a female descendant of Drummond. During the ten months in 1989, prior to Drummond's sentencing hearing, Jane Doe was under the age of fourteen (14) years. She resided in the Drummond family home and was in frequent contact with Drummond. Between approximately October of 1991 and January of 1992, Jane Doe advised several persons that she had been sexually abused on numerous occasions by Drummond. According to Jane Doe, Drummond had sexually assaulted her (by touching her "private parts" so that they "hurt") between December 30, 1988, and October 11, 1989. These persons included Barbara Howe (Jane Doe's counselor) and Sharon Miller.

11. As a convicted sex offender, Drummond was required to participate in a sex offender program at the Montana State Prison. During the course of such program, Drummond admitted to having sexually abused Jane Doe. This information was communicated by prison officials to the Montana Department of Family Services, in accordance with the applicable Montana law requiring the reporting of child abuse information.

12. On December 23, 1991, Drummond was interviewed by Don Ferriter, at the Montana State Prison, in the presence of Pennie Lundstrom (also a DFS social worker) and Tim Hamm, a prison "therapist." During the course of the interview, Drummond stated that, during and after approximately January of 1989, he had begun a sexually-oriented "grooming" process with Jane Doe. (Drummond stated that he was "attracted" and "aroused" by Jane Doe's presence.) According to Drummond, this "grooming" process was intended to prepare Jane Doe for Drummond's ultimate sexual gratification. According to Drummond, he touched Jane Doe "in the crotch" twenty

(20) to thirty (30) times during this period of approximately six (6) to ten (10) months.

13. Further, Affiant sayeth naught.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

SUBSCRIBED AND SWORN TO before me this 29th day of January, 1992.

/s/ Cheri L. Kramer
Notary Public, State of Montana
(NOTARIAL SEAL) Residing at: East Helena
My Commission expires: 1/25/95

RICHARD J. LLEWELLYN
Jefferson County Attorney
Courthouse, P.O. Box H
Boulder, Montana 59632
(406) 225-4251 ext. 57

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA,	)	Cause No. 1364
	)	
Plaintiff,	)	**INFORMATION**
	)	
v.	)	
	)	
LLOYD DEAN DRUMMOND,	)	
	)	
Defendant.	)	
	)	
STATE OF MONTANA	)	
	: ss.	
County of Jefferson	)	

Richard J. Llewellyn, Jefferson County Attorney, being first duly sworn, deposes and upon his oath says that the above-named Defendant, LLOYD DEAN DRUMMOND, has committed the criminal offense of PERJURY, a felony, in violation of Section 45-7-201, MCA, and as alleged in the alternative in Counts I and II hereof.

The offense of PERJURY, a felony, is punishable by imprisonment in the Montana State Prison for a term not exceeding ten (10) years and/or by a fine not exceeding $50,000.

The facts constituting the said offense are as follows:

COUNT I

The Defendant, LLOYD DEAN DRUMMOND, in the course of an official proceeding, to-wit: a sentencing hearing conducted before this District Court on October 11, 1989, at Boulder, within Jefferson County, Montana, knowingly made a false statement or statements under oath, which said statement or statements was or were material, in that said Defendant testified:

(a) That the "only incident of sexual misconduct that [he] ever committed during the period of time that [he] worked at the M.D.C. (the Montana Developmental Center)" was committed against Margretta Glover, and not against any other residents of said institution, when the said Defendant had in fact sexually assaulted, sexually abused, and/or sexually fondled other residents of the said institution; and/or,

(b) That he had conducted himself "as a law-abiding citizen over the course of [the] ten months" prior to the said sentencing hearing, when the Defendant had during such time actually committed repeated offenses of Sexual Assault, a felony, in violation of Section 45-5-502, MCA, or Incest, a felony, in violation of Section 45-5-507, MCA, upon Jane Doe, a female descendant who

was less than fourteen (14) years old, with the Defendant being three (3) or more years older than Jane Doe; or,

COUNT II

As a different and alternative statement of the same offense alleged in Count I hereof,

The Defendant, in official proceedings, to-wit: a sentencing hearing conducted before this District Court on October 11, 1989, at Boulder, within Jefferson County, Montana, on October 11, 1989, and a trial conducted before the Montana Second Judicial District Court on March 19, 1991, at Butte, within Silver Bow County, Montana, knowingly made inconsistent statements under oath, which said statements were material, as follows:

> In the Boulder proceeding, the Defendant testified that "the only incident of sexual misconduct that [he] ever committed during the period of time that [he] worked at the M.D.C. (the Montana Developmental Center)" was committed against Margretta Glover, whereas in the Butte trial, the Defendant testified that he had sexually assaulted, sexually abused, and/or sexually fondled several other residents of said institution in addition to Magretta [sic] Glover.

A list of possible witnesses for the State of Montana, now known to the prosecution, is as follows:

Kathy C. Hilton
Dillon, MT

Laurie Crutcher
Helena, MT

William P. Joyce
Butte, MT

Frank Burgess
Butte, MT

Jim Obie
Helena, MT

G. Curtis Drake
Helena, MT

Glenn Drake
Helena, MT

Jane Doe
Montana City, MT

Sharon Miller
Montana City, MT

Barbara Howe
Helena, MT

Don Ferriter
Helena, MT

Tom Dawson
Boulder, MT

Jim Wright
Butte, MT

Tim Campbell
Boulder, MT

Tom Dolan
Helena, MT

Margaret McGuire
Butte, MT

Cherrill Rolfe
Helena, MT

Steve Sparhawk
Helena, MT

Jim Wannacutt
Butte, MT

Holly Urness
Basin, MT

Pennie Lundstrom
Butte, MT

Tim Hamm
Butte, MT

Tim Schmidt
Boulder, MT

Chris Alexandria
Boulder, MT

DATED this 29th day of January, 1992.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

SUBSCRIBED AND SWORN TO before me this 29th day of January, 1992.

/s/ Cheri L. Kramer
Notary Public, State of Montana
(NOTARIAL SEAL) Residing at: East Helena
My Commission Expires: 1/25/95

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA,	)	Cause No. 1364
	)	**MINUTE ENTRY OR**
Plaintiff,	)	**NOTICE OF RULING**
	)	Dated June 10, 1992
vs.	)	Before Hon. FRANK M.
	)	DAVIS
LLOYD DEAN	)	Court Reporter
DRUMMOND,	)	Laurie Crutcher
	)	Clerk Marilyn J. Stevens
Defendant.	)	Recorded Doc. CME1

Defendant's request for Change of Plea hearing came on this day with Defendant present in the custody of the Sheriff and with Public Defender, Joseph R. Massman. State of Montana was represented by Jefferson County Attorney, Richard J. Llewellyn.

Mr. Massman advised Court that Defendant would be willing to plea Guilty to charge of Perjury if Stipulation allowing appeal on the legal issue of immunity could be entered with the State. No negotiations for sentencing has [sic] occurred and State discussed the problems of appealing the immunity issue since no brief was filed by Defense on their Motion to Dismiss with no formal conclusions by the Court of summary argument heard on 5/20/92. State requested to continue the trial date and have new hearing on Motion to Dismiss.

Defense advised of relatedness of Cause #1365 with this case and that Defendant would be willing to plead to

both cases if concurrent sentences could be imposed. State objected to concurrent sentencing. Mr. Massman requested a briefing schedule and hearing date for both cases.

Court then proceeded with the Change of Plea hearing at request of Defense. Court determined Defendant's name was true, advised of the charge and punishment therefor and determined that Defendant had sufficient time to discuss the case with his attorney. No one had threatened Defendant to change his plea, no agreement regarding sentencing has been discussed and Court would not be bound by plea agreement anyway. Defendant plead [sic] Guilty to the allegations of Purgery [sic] but felt he had been granted immunity in the Civil trial in Butte.

Court allowed the Defendant to withdraw his former plea of not guilty (on 1/29/92) and Defendant then plead [sic] "GUILTY" to the charge of Perjury. Court accepted the plea of Guilty in open Court, with Defense attorney present, Defendant having been advised of his rights, understanding them and waiving them.

Court and State will not require a Pre-Sentence Investigation although Adult Probation and Parole will need to get an update from Montana State Prison regarding Defendant's sex offender's treatment program. (Mr. Massman advised Defendant was now in Stage 2 of the plan).

State requested clarification of Defendant's plea whereupon Lloyd Dean Drummond was sworn and testified. Mr. Massman stipulated that the civil lawyer in

Butte case was not connected with the State (regarding immunity).

Court expressed a desire to dispose of Cause #1365 at this time also but upon Defense's request that the jury trial presently set for July 22, 1992 remain, Court continued the imposition of sentence for this Cause #1364 until after the trial in Cause #1365.

Defendant was remanded to custody of Sheriff for transportation back to the Montana State Prison.

Filed: Sep. 18, 1992
Marilyn J. Stevens,
Court Clerk

MONTANA FIFTH JUDICIAL DISTRICT COURT

JEFFERSON COUNTY

* *

STATE OF MONTANA,	*	Cause Nos. 1364 & 1365
	*	
Plaintiff,	*	
	*	
v.	*	FINDINGS OF FACT,
	*	JUDGMENT &
LLOYD DEAN DRUMMOND,	*	SENTENCE
	*	
	*	
Defendant.	*	

* * * * * * * * * * * *

The Defendant LLOYD DEAN DRUMMOND came before the Court for sentencing on August 26, 1992. From the evidence, presentence report and recommendations the Court now makes its:

FINDINGS OF FACT

1. The Defendant LLOYD DEAN DRUMMOND heretofore entered a voluntary plea of GUILTY to the following offenses:

A. SEXUAL ASSAULT, a felony (Cause No. 1365)

B. PERJURY, a felony (Cause No. 1364)

2. In entering his pleas of GUILTY, the Defendant reserved his right to effect an appeal on certain constitutional grounds, and the pleas were accepted with that reservation.

3. The Defendant is presently in the Montana State Prison on a twenty year maximum sentence imposed by this Court for his conviction of the felony offense of SEXUAL INTERCOURSE WITHOUT CONSENT. That sentence has now been reviewed by the Sentence Review Division of the Supreme Court and has been affirmed.

4. The Court finds pursuant to Sec. 46-16-123, MCA and Sec. 46-18-115, MCA, the personal appearance by the Defendant is not required for imposition of sentence. He is in prison. He attended the sentencing hearing with counsel. He made a statement of mitigation on his own behalf. He has appeared personally and with counsel at all prior proceedings herein. He is fully advised of the contents of the report of the presentence investigation and the respective recommendations. The furtherance of justice and judicial economy, as well as the protection of all the Defendant's rights is fully ensured by the imposition of the sentence in absentia under all the circumstances.

Having made this finding as to the necessity of the Defendant's further presence, the Court has in its Judgment and Sentence granted a reasonable stay of execution to permit the Defendant if he elects to do so the right to personally appear for a formal imposition.

5. The Defendant's offenses as charged in the Information, as well as the one of which he has previously been convicted are all sexually oriented. He is addressing his sexual problems by participating in the sex offender program at the State Prison. The successful completion of that program is a condition for parole eligibility.

From these findings the Court now enters its:

JUDGMENT

I

LLOYD DEAN DRUMMOND is in fact guilty of the felony offenses of SEXUAL ASSAULT as alleged in the Information.

II

LLOYD DEAN DRUMMOND is in fact GUILTY of the felony offense of PERJURY as alleged in the Information.

For the Defendant's convictions, the Court now imposes the following:

SENTENCE

I

For his conviction of the felony offense of SEXUAL ASSAULT, the Defendant is sentenced to a term of ten years in the Montana State Prison with 10 years suspended; said sentence to run consecutive to the twenty year term which he is now serving.

II

For his conviction of the felony offense of PERJURY, the Defendant is sentenced to a term of ten years in the Montana State Prison to run concurrent with the sentence, herein imposed as well as the sentence imposed in Cause No. 1252.

III

IT IS FURTHER ORDERED that execution of the sentences herein imposed shall be stayed for thirty (30) days to permit the Defendant if he elects to do so the opportunity of making a personal appearance before the Court for formal imposition of the sentences herein imposed. Should the Defendant fail to exercise this right granted to him, the sentences as herein imposed shall be effective as of this date.

IV

For clarification of the Defendant's sentences and for the guidance of the records department of Montana State Prison, the Court summarizes the sentences herein imposed as follows:

A. For his conviction of SEXUAL ASSAULT he is sentenced to ten years in Montana State Prison to run consecutive to the twenty years he is presently serving.

B. For his conviction of PERJURY he is sentenced to a term of ten years to run concurrent with all previous sentences.

V

IT IS FURTHER ORDERED that under no circumstance is the Defendant to be eligible for parole until he successfully completes the sex offender program at Montana State Prison.

VI

IT IS FURTHER ORDERED that the sentences herein imposed is [sic] without prejudice to Defendant's rights heretofore reserved to perfect an appear [sic] of his conviction herein for any reason.

DATED this 16th day of September, 1992.

/s/ Frank M. Davis
District Judge

REASONS FOR THE SENTENCE

The reasons for the sentences herein imposed are basically set forth in the decision. The Court would simply add:

The Defendant's offenses are of the nature which rendered him a danger to society. His chances of rehabilitation are marginal at best, but to his credit he acknowledges this fact, and is now attempting to address the problem by his participation in the sexual offender program at the Prison. The Court was impressed with what appeared to be an attitude of genuine remorse. He is indeed sick under the normal criteria. Since he concedes this, the Court believes the herein imposed sentence is well within the sentencing criteria. He has

preserved his right to appeal, but the Court would hope that he accepts his punishment and continues to address his sickness without further technical legal objections. The problem is his sickness, not his constitutional rights. He could very well win the legal battle, but lose the war. At this time he is a menace to his family and indeed society. The Court believes that he recognizes this fact, and hopes that he will continue to address it as he is now doing.

/s/ Frank M. Davis

cc: Richard J. Llewellyn
Joseph R. Massman
James Wright, AP&P
Montana State Prison (on 10/18/92)
Lloyd Dean Drummond

FOR ARGUMENT

13

Supreme Court, U.S.
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No. 91-687

In The

Supreme Court of the United States

October Term, 1992

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ Of Certiorari To The
Montana Supreme Court

SUPPLEMENTAL BRIEF FOR RESPONDENT

BILLY B. MILLER
Counsel of Record
600 Central Plaza, Ste. 300
Great Falls, MT 59401
(406) 727-5990

Attorney for Respondent

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RESPONDENT'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION IS VIOLATED BY COMPELLING HIM TO SUCCESSFULLY COMPLETE A SEXUAL OFFENDER PROGRAM BECAUSE ANY ADMISSION OF PAST CRIMINAL ACTS MAY GIVE RISE TO ADDITIONAL CRIMINAL CHARGES.

Respondent argued in his response brief that his Fifth Amendment Right against self-incrimination was violated when the court compelled him, as a condition of his probation, to successfully complete the sexual offender program where an admission of guilt was a prerequisite to acceptance. As Respondent previously set forth in his brief, the basis for this violation is that additional criminal charges could be brought against him for perjury, as well as that any possibility of acquittal in a new trial based on the witness's recantation, would be virtually non-existent.

It has since been brought to the attention of Respondent, from the decision in a recent case before the Montana Fifth Judicial District Court in Jefferson County (*State v. Drummond,* Cause No. 1365), that he could also be charged for any past criminal sexual activities, which he would be required to reveal as a condition of the treatment program.

In *Drummond,* following his conviction of sexual intercourse without consent, the Defendant was ordered to complete the sexual offender treatment program before he could be eligible for probation or parole. During the course of his participation in the sex offenders treatment program, he revealed past sexual offenses against children. Pursuant to a program requirement that participants divulge any past offenses and undergo polygraphs

to determine if they are withholding any information, a participant is forced to disclose any past illegal sexual activity in order to remain in the group. At the civil proceeding, in which the victim's parents sought damages, the defendant admitted that the criminal charges were true, in order to comply with his therapy. Thereafter, he was charged with perjury, for claiming, under oath, at his initial criminal trial that he had not committed the offense, with which he was charged.

In addition, the prison psychologist reported the incident of alleged incest, which Drummond had confessed to him, to the Department of Family Services, who in turn reported it to the County Attorney, as mandated by law. Section 41-3-201 (1), Montana Code Annotated states:

> **Reports.** (1) When the professionals and officials listed in subsection (2) know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected, they shall report the matter promptly to the department of family services or its local affiliate, which then shall notify the county attorney of the county where the child resides.

Subsection (2)(b) includes, *inter alia*, "any other health or mental health professional."

As a result of the psychologist's report, the County Attorney charged Drummond with the crime of sexual assault. Thereafter, defendant's attorney moved the court for a protective order barring the prison psychologist's testimony in the upcoming trial. The Judge ruled that communications made concerning sexual offenses against children in the course of court ordered sexual offender

treatment were not privileged. This ruling is in direct violation of a Defendant's Fifth Amendment privilege against self-incrimination.

In the Judge's order, he conceded that, "while the Court perceives possible abridgment of self-incrimination and due process rights," the Defendant has "waived any such rights when he participated in the sex offender program, when he knew or at least should have known the consequences." As the defense attorney so aptly told the Judge, "this places the Defendant in a 'Catch-22' position." The Defendant either complies with the conditions of the sexual offenders treatment program and incriminates himself or he is not allowed to participate in the program at all. If the defendant is precluded from participation, he is deprived of the opportunity for probation or parole. However, the cost to society is of paramount consideration. Because the convicted sex offender receives absolutely no treatment, once he is released, he is more likely to re-offend.

The irony here lies in the fact that a person was charged with both perjury and criminal charges in the very same jurisdiction in which the State perceived this type of threat to be speculative and unrealistic. It would seem that the State is attempting to ride the fence on this issue. On one hand, it argues that any future charges are unlikely. However, in an actual situation in which the defendant took the step that Imlay refused to take, and incriminated himself, both charges of perjury and criminal charges were brought.

In light of this new information, Respondent is even more firmly convinced of the potential repercussions of

waiving his Fifth Amendments Right against self-incrimination. Therefore, the decision of the Montana Supreme Court should be upheld.

Respectfully submitted,

BILLY B. MILLER
Counsel of Record
600 Central Plaza, Ste. 300
Great Falls, MT 59401

Attorney for Respondent